

# THE ARMY LAWYER

Headquarters, Department of the Army

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## The Army Lawyer (ISSN 0364-1287)

### Editor

**Captain Benjamin T. Kash**

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*The Army Lawyer* welcomes articles on topics of interest to military lawyers. Articles should be typed double-spaced and submitted to: Editor, *The Army Lawyer*, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22903-1781. Footnotes, if included, should be typed double-spaced on a separate sheet. Articles also should be submitted on floppy disks, and should be in either Enable, WordPerfect, Multimate, DCA RFT, or ASCII format. Articles should follow *A Uniform System of Citation* (15th ed. 1991) and *Military Citation* (TJAGSA, JULY 1988). Manuscripts will be returned only upon specific request. No compensation can be paid for articles.

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DEPARTMENT OF THE ARMY  
OFFICE OF THE JUDGE ADVOCATE GENERAL  
WASHINGTON, DC 20310-2200



REPLY TO  
ATTENTION OF

4 June 1992

DAJA-AL

MEMORANDUM FOR STAFF AND COMMAND JUDGE ADVOCATES

SUBJECT: Interim Change, AR 15-6 - POLICY MEMORANDUM 92-1

1. Investigations conducted pursuant to AR 15-6 are an extremely valuable tool for commanders to use in meeting their responsibilities. Predictably, Operation Desert Shield/Storm led to a number of AR 15-6 investigations. These investigations ranged from relatively routine inquiries conducted in a day to highly complex investigations into sensitive issues like "friendly fire" incidents, taking months and resulting in multi-volume reports. In many instances, the findings and recommendations of AR 15-6 investigations were used as the basis for action not only within the command that conducted the investigation, but also by the senior leadership of the Army and the Department of Defense. The vast majority of AR 15-6 investigations stemming from Operation Desert Shield/Storm were done in a timely, thorough, and highly professional manner, with the detailed assistance and advice of Judge Advocates at all levels.
2. In several cases, however, problems did occur. In response to these problems, a clarifying interim change to AR 15-6, a copy of which is attached, was recently promulgated.
3. The interim change clarifies that investigations conducted under AR 15-6 may be conducted before, concurrently with, or after an investigation into the same or related matters by another command or agency, including CID. However, the change also stresses that concurrent AR 15-6 investigations must be conducted so as to neither hinder nor interfere with other investigations, especially those being conducted by CID or any other criminal investigative agency. The interim change emphasizes coordination with other commands or agencies investigating the same or related matter both to avoid interference and to avoid duplication of investigative effort.
4. This interim change also stresses the advisability of consultation with the servicing Judge Advocate where the findings and recommendations of an investigation under AR 15-6 may result in adverse actions or will be relied upon by higher headquarters.

DAJA-AL

SUBJECT: Interim Change, AR 15-6

5. The interim change is designed to ensure that AR 15-6 investigations remain a flexible and effective means for commanders to resolve factual issues and take appropriate command action, while avoiding even the perception that such investigations are intended to preempt or interfere with related investigations, particularly those conducted by criminal investigative agencies. The interim change is also designed to ensure the detailed involvement of Judge Advocates in significant AR 15-6 investigations. Staff and Command Judge Advocates will ensure that both the letter and the spirit of the interim change are fully adhered to within the commands or agencies they support.

Attachment

JOHN L. FUGH

Major General, USA

The Judge Advocate General's

Headquarters  
Department of the Army  
Washington, DC  
15 April 1992

## Immediate Action INTERIM CHANGE

AR 15-6  
Interim Change  
No. 101  
Expires 15 April 1994

### Boards, Commissions, and Committees

#### Procedure for Investigating Officers and Boards of Officers

**Justification.** This interim change provides guidance on the conduct of concurrent investigations under this and other regulations, and clarifies when an investigation should be referred to the servicing JA for legal review.

**Expiration.** This interim change expires two years from the date of publication and will be destroyed at that time unless sooner superseded or rescinded.

1. AR 15-6, 11 May 1988, is changed as follows:

**Page 3.** Paragraph 1-4, is amended by adding a new paragraph 1-4d:

**d. Concurrent investigations.** An administrative fact finding procedure under this regulation, whether designated an investigation or a board of officers, may be conducted before, concurrently with, or after an investigation into the same or related matters by another command or agency, consistent with paragraph b(5) above. Appointing authorities, investigating officers, and boards of officers will ensure that procedures under this regulation do not hinder or interfere with a concurrent investigation directed by higher headquarters or being conducted by a criminal investigative agency. In cases of concurrent or subsequent investigations, coordination with the other command or agency should be made to avoid duplication of investigative effort where possible.

**Page 4.** Paragraph 2-3b, second sentence is amended by changing it to read: "The appointing authority should do so in all cases involving serious or complex matters, particularly where the findings and recommendations may result in adverse administrative actions (see para 1-8), or will be relied upon in actions by higher headquarters."

2. Post these changes per DA Pam 310-13.

I01, AR 15-6

15 April 1992

3. File this interim change in the front of the publication.

[DAJA-ALP]

By Order of the Secretary of the Army:

GORDON R. SULLIVAN  
General, United States Army  
Chief of Staff

Official:

*Milton H. Hamilton*

MILTON H. HAMILTON  
Administrative Assistant to the  
Secretary of the Army

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## **United States v. Clear: Good Idea—Bad Law**

Major Eugene R. Milhizer  
Joint Services Committee  
Criminal Law Division, OTIAG

### **Introduction**

In *United States v. Clear*,<sup>1</sup> a majority of the Court of Military Appeals found "plain error" in a staff judge advocate's (SJA's) failure to advise a convening authority of the military judge's recommendation for clemency on sentencing. The court's apparent goal—to require SJAs to acknowledge these recommendations in their mandatory post-trial recommendations<sup>2</sup>—is a good idea. Nevertheless, the process by which the court achieved that goal—that is, judicially amending a properly promulgated procedural rule simply because it was unwise or was capable of improvement—is bad law.

Admittedly, to contend that a decision that improves a particular law is itself bad law is counterintuitive. The natural impulse is quite the opposite: one is inclined to believe that one should welcome improvements to a body of law, whatever their sources and however they might be effected, and that any change that promotes justice or fairness within a legal system necessarily must enhance that system as a whole. This philosophy appears to enjoy the twin virtues of simplicity and sensibility. Cast in slightly different light, however, it exalts content over methodology and encourages ad hoc lawmaking at the expense of legitimate legislative processes. Viewed critically, a theory that at first glance seemed rational is revealed to be distressingly sophistic.

The contrary jurisprudential approach to which the author subscribes holds that the legitimacy of a given law ultimately depends upon the legitimacy of the process that created it. A legitimate process normally begets wise laws; when it does not, it will correct its errors if given time to do so. Accordingly, the integrity of the lawmaking process should not be compromised to enhance the content of a single law.

These two philosophies do not always clash. In *Clear*, however, conflict was unavoidable. The Court of Military

Appeals confronted a rule having the force of law, born of a legitimate lawmaking process, that at worst was unwise and at best was susceptible to improvement. This article will examine how the court resolved the fundamental philosophical tension between improving the content of a particular law and respecting the process of lawmaking.

### **Case History: *United States v. Clear***

A military judge, sitting as a general court-martial, convicted Staff Sergeant Earl P. Clear of larceny<sup>3</sup> and of conspiracy to commit larceny.<sup>4</sup> The accused previously had served as a noncommissioned officer in the Air Force security police. While deployed in Panama during Operation Just Cause, he conspired with other security policemen to steal stereo equipment from a building that he was assigned to guard, then actually stole the equipment.

The military judge sentenced Clear to a bad-conduct discharge, confinement with forfeiture of \$150 pay per month for eight months, and reduction to airman basic (E-1). Immediately after adjudging this sentence, the judge recommended on the record "that the 3320th Corrections and Rehabilitation Squadron at Lowry Air Force Base, Colorado, be designated as the place of confinement and that Sergeant Clear be afforded an opportunity to earn conditional suspension of the discharge."<sup>5</sup>

After the trial, the SJA advised the accused of his right to submit matters to the convening authority.<sup>6</sup> The SJA then provided Clear with a copy of the SJA's post-trial recommendation. The SJA's recommendation did not mention the military judge's clemency recommendation. It merely stated that the SJA found "no reason to recommend clemency," advised the convening authority to approve the sentence, and recommended that the accused be confined at "the 3320 CRS Centralized Confinement System."<sup>7</sup>

<sup>1</sup>34 M.J. 129 (C.M.A. 1992).

<sup>2</sup>Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1105 [hereinafter R.C.M.].

<sup>3</sup>Uniform Code of Military Justice art. 121, 10 U.S.C. § 921 (1988) [hereinafter UCMJ].

<sup>4</sup>UCMJ art. 81.

<sup>5</sup>*Clear*, 34 M.J. at 130. The military judge explained that he based his clemency recommendation upon the accused's "previous superb record [and on] the recommendations of [the accused's] supervisors and other NCOs." *Id.* In its opinion, the Court of Military Appeals set forth in detail the favorable sentencing evidence that Clear presented at his court-martial. See *id.* at 130-31.

<sup>6</sup>The SJA specifically advised the accused of his rights to submit to the convening authority "Clemency Recommendations by any court member, the military judge, or any other person" and "[to express his] . . . desires for retraining and rehabilitation at the 3320th Correctional Rehabilitation Squadron." *Id.* at 130.

<sup>7</sup>*Id.*

The defense counsel later submitted a clemency request, urging the convening authority to disapprove the forfeitures, to approve only a single-grade reduction, and to reduce the period of confinement. The bases for this clemency included the accused's financial obligations to his family members and the distress that the adjudged sentence would cause them. The accused's supervisors also submitted letters asking the convening authority to ease the hardship on Clear's family by remitting the forfeitures and mitigating the reduction.

In his addendum, the SJA stated that, after "carefully consider[ing] all matters in extenuation and mitigation submitted by the accused at and after trial," he adhered to his initial recommendation. No mention of the military judge's recommendation appeared in the SJA's recommendation or in any other posttrial document submitted to the convening authority.<sup>8</sup>

On appeal, the Air Force Court of Military Review examined this issue only to determine whether the failure of the trial defense counsel to alert the convening authority to the judge's clemency recommendation constituted ineffective assistance of counsel.<sup>9</sup> Relying in part on the defense counsel's posttrial affidavit, the Air Force court resolved the issue against the accused<sup>10</sup> and affirmed his conviction and sentence.

Clear then argued his case before the Court of Military Appeals. The three judges who heard this appeal issued separate opinions.<sup>11</sup> Only the lead opinion, written by Senior Judge Everett, addressed Clear's claim of ineffective assistance of counsel. The Senior Judge concluded summarily that the record in the case, including the affidavit, inadequately supported the Air Force court's conclusion that the defense counsel had rendered effective assistance.<sup>12</sup>

This finding, however, was not crucial to the decision. Rather than concentrating on the adequacy of the defense counsel, the court focussed on whether the SJA's failure to tell the convening authority about the military judge's clemency recommendation amounted to "plain error." Senior Judge Everett concluded that the omission of this information from the SJA's posttrial recommendation was plain error.<sup>13</sup> He reached this conclusion despite his candid admission that

[a]rticle 60(d) of the Uniform Code [of Military Justice] . . . provides that the staff judge advocate's recommendation "shall include such matters as the President may prescribe by regulation"; and RCM 1106(d)(3)—which prescribes the "Required contents" of a staff judge advocate's recommendation—does not "include" . . . information as to clemency recommended by the sentencing judge.<sup>14</sup>

In his concurring opinion, Chief Judge Sullivan agreed that "plain error occurred in this case."<sup>15</sup> He added, "Brevity of expression does not contemplate omission of essential matters related to the adjudged sentence. A recommendation for clemency by a court-martial at trial . . . has long been considered such a matter."<sup>16</sup>

Judge Cox dissented, but he noted that he "agree[d] with Chief Judge Sullivan's concurring opinion that the convening authority must be told about the military judge's clemency recommendation."<sup>17</sup> Judge Cox explained that he would affirm Clear's sentence only because the "unique facts of this case" suggested a legitimate reason for the SJA's decision not to advise the convening authority of the recommendation.<sup>18</sup>

<sup>8</sup>The military judge's clemency recommendation was reflected verbatim in the record of trial; however, the recommendation's presence on the record did not guarantee that the convening authority would see it. Although a convening authority may consider the record of trial before taking action (records of trial routinely are made available to convening authorities for this purpose) the convening authority is not required to read this lengthy document. See R.C.M. 1107(b)(3)(B)(i). Presumably, few convening authorities ever do so. See *United States v. McLemore*, 30 M.J. 605, 607 (N.M.C.M.R. 1990).

<sup>9</sup>*United States v. Clear*, 32 M.J. 658 (A.F.C.M.R. 1991), *rev'd*, 34 M.J. 129 (C.M.A. 1992).

<sup>10</sup>See generally *Strickland v. Washington*, 466 U.S. 668 (1984) (expressing the constitutional standard for proving ineffective assistance of counsel).

<sup>11</sup>Chief Judge Sullivan, Judge Cox, and Senior Judge Everett participated in the decision. *Clear*, 34 M.J. at 129. Judges Crawford, Gierke, and Wiss did not participate. *Id.* at 133.

<sup>12</sup>See *id.* at 132.

<sup>13</sup>See *id.* at 133.

<sup>14</sup>*Id.* Senior Judge Everett also compared R.C.M. 1106 with R.C.M. 1105, commenting that the latter provision, "which concerns matters that an accused may submit to the convening authority, does specifically mention [c]lemency recommendations." *Id.*

<sup>15</sup>*Id.* at 133 (Sullivan, C.J., concurring).

<sup>16</sup>*Id.* (citing William W. Winthrop, *Military Law and Precedents* 178, 443 (2d ed. reprint 1920)).

<sup>17</sup>*Id.* at 134 (Cox, J., dissenting).

<sup>18</sup>*Id.* Judge Cox remarked,

[The] appellant did not want to dedicate himself to the rigors of retraining and rehabilitating himself. Had the staff judge advocate told the convening authority about the recommendation, defense counsel would have been between the proverbial "rock and a hard place." If he tells the convening authority his client does not want to participate in an effort to restore him to duty, he is not likely to receive clemency. If he does not tell the convening authority that his client is unwilling to pay the price of being rehabilitated, then the convening authority might follow the judge's recommendation.

*Id.*

Accordingly, at least two—and perhaps all three—judges declared that an SJA's posttrial recommendation must advise the convening authority of the sentencing judge's clemency recommendation. By so ruling, the court shifted the burden of notifying the convening authority of the judge's recommendation from the defense counsel to the SJA. This reallocation of responsibility presumably would apply in all cases, absent an explicit, tactically reasonable request to the contrary by the defense counsel.

#### Is the Change that *Clear* Requires a Good Idea?

*Clear's* judicial amendment of Rule for Courts-Martial (R.C.M.) 1106 transferred to the proper authority the responsibility of advising the convening authority of the sentencing judge's clemency recommendation. Moreover, this change has other, ancillary benefits. Considered in the abstract, it is a good idea.

At present, the Rules for Courts-Martial meticulously divide posttrial advisory responsibilities between the SJA and the trial defense counsel. Pursuant to R.C.M. 1106(d)(3), the SJA must advise the convening authority of the following:

(A) The findings and sentence adjudged by the court-martial;

(B) A summary of the accused's service record, to include length and character of service, awards and decorations received, and any records of nonjudicial punishment and previous convictions;

(C) . . . [T]he nature and [the] duration of any pretrial restraint;

(D) If there is a pretrial agreement, . . . any action [that] the convening authority is obligated to take under the agreement or . . . the reasons why the convening authority is not obligated to take specific action under the agreement; and

(E) [The SJA's] . . . specific recommendation as to the action to be taken by the convening authority on the sentence.

On the other hand, R.C.M. 1105(b) authorizes the trial defense counsel to apprise the convening authority of the following data:

(1) Allegations of errors affecting the legality of the findings or sentence;

(2) Portions or summaries of the record and copies of documentary evidence offered or introduced at trial;

(3) Matters in mitigation which were not available for consideration at the court-martial; and

(4) Clemency recommendations by any member, the military judge, or any other person.<sup>19</sup>

In responding to the defense's R.C.M. 1105 submissions, the SJA must state "whether corrective action on the findings or sentence should be taken" in light of matters raised by these submissions.<sup>20</sup> When appropriate, the SJA also should comment on other matters pertaining to possible legal errors.<sup>21</sup> Otherwise, the decision to include additional matters in the posttrial recommendation is left solely to the discretion of the SJA.<sup>22</sup> The SJA must serve a copy of the posttrial recommendation upon the defense counsel, who may submit matters in rebuttal to the convening authority prior to action.<sup>23</sup>

Accordingly, R.C.M. 1105 and 1106 divide responsibility for advising a convening authority along lines that relate rationally to the different roles of the SJA and the trial defense counsel. As the convening authority's chief legal advisor, the SJA must ensure that justice is done. Consistent with this responsibility, the SJA's written recommendation must address all matters that are relevant and necessary to the convening authority's action. These include the findings and the sentence, a summary of the accused's record, any conclusive findings on pretrial restraint, and any limitations that a pretrial agreement might impose on the convening authority's discretion. The SJA also must comment on the proposed sentence. Aside from this sentencing recommendation, the information for which the SJA is responsible is factual and objective.

On the other hand, the rules anticipate that the defense counsel will—and should—continue to act as an advocate after the accused is convicted and sentenced.<sup>24</sup> They permit—

<sup>19</sup>Rule for Courts-Martial 1105(b) presently provides that an accused may submit only "written matters" to the convening authority. *But see* United States v. Davis, 33 M.J. 13 (C.M.A. 1991) (holding that UCMJ art. 60(b)(1), upon which R.C.M. 1105 is based, does not restrict the defense to written submissions); *see also* TJAGSA Practice Note, *Has Anyone Really Considered What "Consider" Really Means?*, The Army Lawyer, Jan. 1992, at 339, 40-41.

<sup>20</sup>R.C.M. 1106(d)(4).

<sup>21</sup>*Id.*

<sup>22</sup>R.C.M. 1106(d)(5).

<sup>23</sup>R.C.M. 1106(f).

<sup>24</sup>*See* R.C.M. 505(d)(2), 1104(b)(1)(C), 1106(f); *see also* United States v. Robinson, 11 M.J. 218 (C.M.A. 1981); United States v. Iverson, 5 M.J. 440 (C.M.A. 1978).

but do not require—the defense counsel to submit clemency recommendations to the convening authority and to challenge unfavorable rulings by the trial judge. These submissions are neither strictly factual, nor essentially objective. As products of advocacy, most of them are primarily subjective.

The Rules for Courts-Martial recognize that clemency recommendations generally fall within the purview of defense advocacy. Usually presented as opinion evidence, these recommendations necessarily are subjective. When presented at trial, they often are attacked during cross-examination or in rebuttal and sometimes are received over the Government's objection. Defense attorneys also solicit and receive clemency recommendations after trials. These recommendations are equally subjective, although they need not pass through the crucible of cross-examination and never are subjected to objections on admissibility. Rules for Courts-Martial 1105 and 1106 rationally permit the defense to submit these clemency recommendations to the convening authority without requiring the SJA to advise the convening authority on these matters. Furthermore, the rules fairly provide the defense with an opportunity to respond if the SJA decides to advise the convening authority about clemency.

A sentencing authority's recommendation for clemency, however, is completely different from other clemency recommendations. It is not opinion evidence, subject to objections for inadmissibility or irrelevance. On the contrary, it is inherently admissible and relevant. Similarly, the weight of a sentencing authority's clemency recommendation, unlike the testimony of a witness, cannot be challenged in a traditional sense. The factual, objective information related in a recommendation for clemency by the sentencing authority at trial is relevant and, arguably, essential to a convening authority's posttrial action.

The limitations that the Manual imposes on sentencing authorities accentuate the distinctive character of their recommendations for clemency.<sup>25</sup> For instance, no sentencing authority—whether a military judge or the members of a court-martial panel—may adjudge a suspended sentence.<sup>26</sup> Consequently, a contemporaneous clemency recommendation by a sentencing authority often represents more than mere suggestion to the convening authority. On the contrary, this

recommendation usually implies that, but for the Manual's restrictions, the sentencing authority would have adjudged a suspended sentence.<sup>27</sup> The rule that the court established in *Clear* has other benefits. Shifting notification responsibility from the defense counsel to the SJA relieves the appellate courts of the unsavory task of determining whether a trial defense counsel's failure to inform the convening authority of a clemency recommendation amounts to ineffective assistance.<sup>28</sup> Eliminating this issue permits a court to reduce its reliance on the disfavored—but occasionally essential—practice of using ex post facto affidavits to resolve an appellate issue. Moreover, requiring the SJA to advise the convening authority of a clemency recommendation will save the government the time and the expense of new recommendations and actions if the defense counsel's failure to convey this information otherwise would have amounted to ineffective assistance.<sup>29</sup>

Senior Judge Everett mentioned several other policy reasons supporting the court's decision. First, permitting an SJA to pass over a sentencing authority's clemency recommendation without comment could encourage SJAs to prepare careless or superficial posttrial recommendations.<sup>30</sup> Second, for an SJA "to advise a convening authority of the sentence adjudged . . . without [mentioning] . . . the concomitant clemency recommendation is almost [inherently] misleading."<sup>31</sup> Third, "when the clemency recommendation of the military judge is not even mentioned by the staff judge advocate in his [or her] recommendation, the omission contravenes the reasonable expectation of the military judge; and also it indirectly disparages the role of the military judge in the military justice system."<sup>32</sup>

All these reasons are compelling. Manifestly, *Clear* improved a military law. One question, however, remains unanswered: Is *Clear* good law?

### Is The Method that the Court Used Good Law?

That the change that *Clear* implemented is a good idea does not mean necessarily that *Clear* itself is good law. The means by which the Court of Military Appeals introduced this bene-

<sup>25</sup> See generally R.C.M. 1103(b) (authorized punishments).

<sup>26</sup> See R.C.M. 1108(b); *id.* discussion.

<sup>27</sup> A post-trial recommendation for clemency by an individual court member, or by the military judge in a trial in which the members sentence the accused, more closely resembles opinion evidence. Accordingly, the defense counsel logically should be responsible for bringing this recommendation to the attention of the convening authority. The holding in *Clear* does not appear inconsistent with this conclusion.

<sup>28</sup> See generally *Strickland v. Washington*, 466 U.S. 668 (1984) (the defendant must show that counsel's performance was deficient and that this deficient performance prejudiced the defense so grievously that the defendant was deprived of a fair trial).

<sup>29</sup> See *United States v. Rich*, 26 M.J. 518 (A.C.M.R. 1989). "[S]taff judge advocates would be well advised to include a military judge's clemency recommendation in their post-trial recommendations. . . . [A]lthough the error may be that of trial defense counsel, it is the staff judge advocates who prepare new post-trial recommendations." *Id.* at 521; see also *United States v. Davis*, 20 M.J. 1015 (A.C.M.R. 1985).

<sup>30</sup> *Clear*, 34 M.J. at 133.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

ficial change into military jurisprudence also should be legitimate. In this regard, *Clear* fails.

To understand this criticism of *Clear*, one must appreciate the scope and authority of the 1984 Manual for Courts-Martial.<sup>33</sup> "The Manual is prescribed by the President pursuant to his or her statutory authority to establish pretrial, trial, and post-trial procedures and to limit the maximum punishments that may be adjudged for violations of the UCMJ."<sup>34</sup> Accordingly, "the Manual has the force of law and is subordinate only to the Constitution, treaties, and federal statutes."<sup>35</sup>

Specifically, UCMJ article 36 provides that "[p]retrial, trial, and post-trial procedures, including modes of proof, for . . . courts-martial . . . may be prescribed by the President."<sup>36</sup> Pursuant to this authority, Presidents Ronald Reagan and George Bush have prescribed and amended the Rules for Courts-Martial in the 1984 Manual and its changes. "Each rule states binding requirements except when the text of the rule expressly provides otherwise."<sup>37</sup> Indeed, the 1984 Manual denominates specific provisions as *rules*, rather than discussions or analyses, to indicate unmistakably that these portions of the Manual have the force of law.<sup>38</sup>

The President, in his or her capacity as Commander in Chief,<sup>39</sup> also may have independent, constitutional authority

to prescribe procedures for courts-martial.<sup>40</sup> No president, however, ever has relied primarily upon inherent constitutional authority to promulgate any provision in the Manual; therefore, this article neither will address, nor will assume, the existence of that authority.

That the President has prescribed a rule for courts-martial does not mean that the rule is lawful. The Court of Military Appeals and the courts of military review play essential roles in assessing the legality of Manual provisions and in interpreting their meanings and scopes. The military appellate courts must determine the constitutionality of Manual provisions, the degree to which Manual provisions comport with statutory authority, relationships between the Manual provisions themselves, and the lawfulness of regulations and rules that supplement and implement the Manual.<sup>41</sup> A brief discussion of each follows.

First and foremost, the military appellate courts must ensure that the Manual and its components are constitutional.<sup>42</sup> Pursuant to this responsibility, the courts attempt to interpret and to apply Manual provisions in a manner consistent with the Constitution, while eschewing unconstitutional applications.<sup>43</sup> The unquestionable importance of this responsibility requires no extensive discussion or citation to authority.<sup>44</sup>

<sup>33</sup> See generally Manual for Courts-Martial, United States, 1984, preamble, app. 21, at A21-3 to A21-4 [hereinafter MCM, 1984]; Frederic I. Lederer, *The Military Rules of Evidence: Origins and Judicial Interpretation*, 130 Mil. L. Rev. 5, 6-8 (1990).

<sup>34</sup> Criminal Law Division Note, *Amending the Manual for Courts-Martial*, The Army Lawyer, Apr. 1992 at 78, 79 (footnotes omitted); see UCMJ arts. 36, 56.

<sup>35</sup> Lederer, *supra* note 33, at 6.

<sup>36</sup> UCMJ art. 36(a). Congress amended article 36 more than 10 years ago to emphasize that the word "procedure" encompasses "[p]retrial, trial, and post-trial procedures." See Act of Nov. 9, 1979, Pub. L. No. 96-17, 93 Stat. 811. This amendment was needed to overrule *United States v. Ware*, 1 M.J. 282 (C.M.A. 1976), in which the Court of Military Appeals, reading article 36 too narrowly, concluded that the President's authority under that article did not extend to posttrial procedures. Frederick B. Wiener, *American Military Law in the Light of the First Mutiny Act's Tricentennial*, 126 Mil. L. Rev. 1, 72-73 (1989). By enacting this amendment, Congress reaffirmed a principle that it has recognized since World War I—that is, the President exercises preeminent authority to prescribe rules of procedure for courts-martial. See *id.* at 72; see also Articles of War, art. 38 (1916) (precursor to UCMJ article 36).

<sup>37</sup> MCM, 1984, analysis at A21-2; see also UCMJ art. 56 ("[t]he punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense") (emphasis added). The military courts, however, may exercise a sort of "rulemaking" authority over the Military Rules of Evidence. See Eugene R. Fidell & Linda Greenhouse, *A Roving Commission: Specified Issues and the Function of the United States Court of Military Review*, 122 Mil. L. Rev. 117, 120-23 (1988).

<sup>38</sup> Lederer, *supra* note 33, at 7-8; Criminal Law Division Note, *supra* note 34, at 78.

<sup>39</sup> U.S. Const. art. II, § 2.

<sup>40</sup> See Exec. Order No. 12,473, 49 Fed. Reg. 17,152 (1984), amended by Exec. Order No. 12,484, 49 Fed. Reg. 28,825 (1984) (declaring that the Manual for Courts-Martial is prescribed "[b]y virtue of the authority vested in . . . [the] President by the Constitution of the United States and by Chapter 47 of Title 10 of the United States Code (Uniform Code of Military Justice)"). See generally *United States v. Jeffress*, 28 M.J. 409, 413 (C.M.A. 1989) (discussing the authority of the President, acting as Commander in Chief, to declare certain conduct punishable under UCMJ article 134); *United States v. Ezell*, 6 M.J. 307 (C.M.A. 1979) (commenting on the President's authority as Commander in Chief over military justice concerns).

<sup>41</sup> As previously noted, a court may exercise even broader authority over the Military Rules of Evidence. See Fidell & Greenhouse, *supra* note 37, at 120-23.

<sup>42</sup> See generally *United States v. Matthews*, 16 M.J. 354, 364-68 (C.M.A. 1983) (discussing the authority of the Court of Military Appeals to review the constitutionality not only of the Manual, but also of the UCMJ); *United States v. Frischholz*, 36 C.M.R. 304, 306 (C.M.A. 1966).

<sup>43</sup> See generally *United States v. Harris*, 8 M.J. 52 (C.M.A. 1979) (holding that a court should adopt an interpretation of a statute, consistent with statutory language, that raises no doubt about the statute's constitutionality). Questions commonly arise about the constitutional applications of the Military Rules of Evidence. E.g., *United States v. Clemons*, 16 M.J. 44, 49-50 (C.M.A. 1983) (Everett, C.J., concurring) (discussing constitutionality of military judge's application of the character evidence rule, see Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 404(a) [hereinafter Mil. R. Evid.]); *United States v. Dorsey*, 16 M.J. 1 (C.M.A. 1983) (discussing constitutionality of the "rape shield rule," Mil. R. Evid. 412). Similar questions may arise in other contexts. E.g., *United States v. Santiago-Davila*, 26 M.J. 380 (C.M.A. 1988) (constitutionality of R.C.M. 912 as it pertains to peremptory challenges).

<sup>44</sup> See generally *Matthews*, 16 M.J. at 367 (citing *Paul v. United States*, 371 U.S. 245 (1963); *Standard Oil Co. v. Johnson*, 316 U.S. 481 (1942)).

Second, the courts must ensure that the Rules for Courts-Martial and other Manual provisions comport with the UCMJ and other federal statutes.<sup>45</sup> The most common inconsistencies between the Manual and the UCMJ arise when the Manual improperly addresses substantive matters, rather than procedure,<sup>46</sup> or when a procedural provision in the Manual conflicts with procedures required by the UCMJ.<sup>47</sup> In either circumstance, the Court of Military Appeals has not hesitated to invalidate the offending provisions in the Manual.<sup>48</sup>

Third, the courts must resolve apparent and actual inconsistencies between different Manual provisions.<sup>49</sup> This may be the quintessential responsibility of an appellate court—to interpret and apply a comprehensive body of law consistently to achieve the purpose for which it was promulgated. This process requires the courts to apply traditional rules of statutory construction, reviews of legislative histories,<sup>50</sup> and other tenets of appellate interpretation to the provisions in the Manual.<sup>51</sup> Few appellate opinions, however, actually address perceived conflicts within the Manual. This may be attributed

to several factors, including the overall coherence of the Manual and the reluctance of the military courts to adopt such a restrictive form of appellate review.<sup>52</sup>

Finally, the courts must resolve apparent and real conflicts between (1) the Constitution, federal statutes, and the Manual; and (2) supplementary or implementing regulations<sup>53</sup> and rules of court.<sup>54</sup> Of course, the latter provisions must yield to the supremacy of the former.

The Court of Military Appeals also has suggested two questionable rationales for judicial interpretation of the Manual. Periodically, the court has predicated a holding on the notion that it exercises "supervisory authority" over the military justice system.<sup>55</sup> In other decisions, the court has resorted to concepts of "military due process" as bases for its rulings.<sup>56</sup> These asserted bases of judicial authority raise several important issues that the court has declined to resolve<sup>57</sup>—among them, the concern that an expansive application of either theory would deprive the Manual of its status

<sup>45</sup>This statement assumes that any constitutional authority that the President may exercise as Commander in Chief is not implicated. See generally *supra* note 40 and accompanying text.

<sup>46</sup>See, e.g., *United States v. Harris*, 29 M.J. 169 (C.M.A. 1989) (the President may not change substantive law; therefore, a provision that purportedly amended the Manual to expand the scope of resisting apprehension to include flight from apprehension is invalid); *Ellis v. Jacob*, 26 M.J. 90 (C.M.A. 1988) (the President may not change substantive military law by including language in the Manual that would eliminate the defense of partial mental responsibility); see generally Eugene R. Milhizer, *Battery Without Assault*, The Army Lawyer, Oct. 1991, at 4, 11.

<sup>47</sup>See, e.g., *Davis*, 33 M.J. at 15-16 (R.C.M. that purportedly limits an accused's submissions to the convening authority to "written" matters is inconsistent with the UCMJ and, therefore, is invalid).

<sup>48</sup>Unfortunately, the court sometimes has been hesitant to recognize the President's preeminent authority—*vis-à-vis* the military appellate courts—to prescribe procedures implementing the UCMJ. See, e.g., *United States v. Harvey*, 23 M.J. 280 n.\* (C.M.A. 1986) (mem.).

<sup>49</sup>E.g., *United States v. McMillian*, 33 M.J. 257 (C.M.A. 1991) (resolving potential inconsistency between R.C.M. 905(e) and the discussion to R.C.M. 907(b)(3)(B)); *United States v. Ludlam*, 26 M.J. 813 (A.C.M.R. 1988) (examining a purported conflict between R.C.M. 1001(b)(4) and Mil. R. Evid. 712). See generally *Murray v. Haldeman*, 16 M.J. 74 (C.M.A. 1983) (harmonizing Mil. R. Evid. 313(b) and Mil. R. Evid. 314(k)).

<sup>50</sup>The "legislative history" of the Manual appears in the drafters' analysis, see MCM, 1984, app. 21, and in the analysis of the Military Rules of Evidence, see *id.*, app. 22. See generally *United States v. Mance*, 26 M.J. 244 (C.M.A. 1988) (discussing the significance of the drafters' analysis).

<sup>51</sup>E.g., *United States v. Ortiz*, 24 M.J. 164, 168-69 (C.M.A. 1987) (interpreting penal statute to accomplish its obvious purpose); *United States v. Schelin*, 15 M.J. 218 (C.M.A. 1983) (criminal statute should be construed strictly and any ambiguities should be resolved in favor of the accused); *United States v. Redding*, 11 M.J. 100 (C.M.A. 1981) (interpreting identical language used in two different parts of a single statute).

<sup>52</sup>See *Harvey*, 23 M.J. at 280; see also *United States v. Connor*, 27 M.J. 378 (C.M.A. 1989) (considering Mil. R. Evid. 804(b)(1) in relation to the former testimony of a witness at an article 32 hearing). Compare *United States v. Postle*, 20 M.J. 632, 643 (N.M.C.M.R. 1985) (Military Rules of Evidence are not set in "concrete," but change to incorporate extant constitutional privileges), with *United States v. Johnson*, 21 M.J. 553, 556-57 (A.F.C.M.R. 1985) (*en banc*) (appellate court is bound by the Military Rules of Evidence). Chief Judge Sullivan has cautioned the courts of military review to exercise appropriate judicial restraint in addressing this issue. In one recent case, he remarked,

I agree with my Brothers' resolution of the uncharged misconduct issue, but I disagree with their resolution of the waiver issue.

Their expansive interpretation of Article 66(c), Uniform Code of Military Justice, . . . has created a court of equity, not law. Admittedly, a service appellate court has extraordinary factfinding powers and unique sentence assessment power. . . . When it purports to decide questions of law, [however,] it should be bound by rules of law like any other court.

*United States v. Claxton*, 32 M.J. 159, 165 (C.M.A. 1991) (Sullivan, C.J., concurring) (citations omitted).

<sup>53</sup>See generally *United States v. Woods*, 26 M.J. 372 (C.M.A. 1988) (discussing authority of the Secretary of the Army to prescribe regulations); *United States v. Lee*, 25 M.J. 457 (C.M.A. 1988) (recognizing that regulations cannot be applied to an accused in derogation of his or her constitutional or statutory rights).

<sup>54</sup>See generally *United States v. Williams*, 23 M.J. 362 (C.M.A. 1987) (local court rules cannot conflict with the Manual); *United States v. Rodriguez-Amy*, 19 M.J. 177 (C.M.A. 1985) (discussing authority of a court of military review to establish rules denying oral argument); *United States v. Verdi*, 5 M.J. 330 (C.M.A. 1978) (Air Force regulation forbidding military personnel to wear wigs except to cover disfigurement or baldness is constitutional).

<sup>55</sup>See generally *Gale v. United States*, 36 C.M.R. 304, 306 (C.M.A. 1967) (asserting that Congress has conferred upon the Court of Military Appeals "a general supervisory power over the administration of military justice").

<sup>56</sup>See generally *United States v. Woods*, 8 C.M.R. 3 (C.M.A. 1953); *United States v. Clay*, 1 C.M.R. 74 (C.M.A. 1951) (discussing the meaning and scope of military due process).

<sup>57</sup>See generally David A. Schluter, *The Twentieth Annual Kenneth J. Hodson Lecture: Military Justice for the 1990's—A Legal System Looking for Respect*, 133 Mil. L. Rev. 1, 13-14 (1991) (discussing military due process).

as binding legal authority. Because neither concept is well developed and because neither served as a basis for the court's decision in *Clear*, this article will not discuss them further.

Applying the accepted principles of judicial review to the rules at issue in *Clear* leads to the unmistakable conclusion that *Clear* is bad law. The court did not suggest—and seriously could not contend—that the portions of R.C.M. 1105 and 1106 it reviewed are in any manner unconstitutional, either facially or as they were applied in the instant case. Likewise, the court did not assert that the rules are substantive, rather than procedural, or that they conflict with the UCMJ or with other statutes.<sup>58</sup> Finally, the court did not find that these rules contradict any other provisions of Manual.

Rules for Courts-Martial 1105 and 1106 presumptively have the force of law. Although the court properly questioned the wisdom of R.C.M. 1105 and 1106 as they presently appear in the Manual, its decision in no way undermined—or even challenged—this underlying presumption of legal authority. By amending R.C.M. 1106 judicially, the court acted as a

rulemaker, rather than a rule interpreter. Consequently, the court's good idea, as implemented in *Clear*, is bad law.<sup>59</sup>

## Conclusion

This article does not question the motives of the Court of Military Appeals. In deciding *Clear*, the court implemented a good idea that will promote fairness to the accused in courts-martial. Unquestionably, R.C.M. 1105 and 1106 should be amended to incorporate the changes the court demanded in *Clear*.

Nevertheless, *Clear* is bad law. Impelled by the best of motives, the court failed to exercise proper restraint and assumed the role of an executive or a super-legislature. The consequences of this judicial activism are plain: the court has "deprive[d] the military justice system of its predictability and stability . . . [and has called] into question [its] own legitimacy under the law."<sup>60</sup> The benefits of the change that the court secured in *Clear* are undeniable, but their costs well may outweigh their merits.

<sup>58</sup>In his lead opinion in *Clear*, Senior Judge Everett actually "[a]dmitted[ ]" that UCMJ article 60(d) provides that the President shall decide what matters must be included in an SJA's recommendation to a convening authority. See *Clear*, 34 M.J. at 133.

<sup>59</sup>The court can exercise other options to improve the Manual. For example, the court can propose amendments to the Manual to the Joint Service Committee on Military Justice (JSC). A representative of the Court of Military Appeals is a nonvoting member of the JSC and its working group. See Criminal Law Division Note, *supra* note 34, at 79. Moreover, judges of the court can propose changes to the UCMJ that would correct apparent deficiencies in the Manual. See UCMJ art. 146. Finally, the court can identify problems with the Manual in its published opinions and can suggest language to correct these problems. Cf. *United States v. Jeffress*, 26 M.J. 972, 974 n.2 (A.C.M.R. 1988) (recommending congressional action to correct anomaly in military law of kidnapping), *aff'd*, 28 M.J. 409 (C.M.A. 1989).

<sup>60</sup>Lederer, *supra* note 33, at 38; see also Wiener, *supra* note 36, at 42-43. Describing one early decision in which the Court of Military Appeals effectively impugned its own legitimacy, Colonel Wiener wrote,

[T]he . . . [court] refused to follow a provision in the presidentially-prescribed *Manual for Courts-Martial*, which declared that, in any case where a dishonorable discharge had been adjudged and approved, the accused was automatically reduced to the lowest enlisted grade. The [court's] ruling in that case was proved wrong by two later events. First, the Court of Claims subsequently denied a petition for back pay that rested on the assertion that such a reduction was erroneous. Second, Congress promptly amended the Code by adding article 58a, which restored the *Manual* provision that the [Court of Military Appeals] had invalidated.

*Id.* (discussing *United States v. Simpson*, 27 C.M.R. 303 (C.M.A. 1959)) (footnotes omitted).

## What Is a Plan? Judicial Expansion of the Plan Theory of Military Rule of Evidence 404(b) in Sexual Misconduct Cases

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### Introduction

The courts long have afforded special treatment to the use of uncharged misconduct evidence in the prosecution of

sexual offenses—especially in cases involving deviant sexual behavior.<sup>1</sup> Sensitive to the difficulties of proof in these cases and to the prevailing belief that the perpetrators of sexual crimes have a high rate of recidivism, many trial and appellate

<sup>1</sup>See Edward J. Imwinkelried, *Uncharged Misconduct Evidence* §§ 4:11-18 (1984 and Supp. 1991).

judges have adopted liberal views on admitting evidence of an accused's prior sexual offenses.<sup>2</sup> Courts in several jurisdictions have established express "sexual offense exceptions" to the traditional proscription on using evidence of an uncharged offense to prove an accused's criminal propensity.<sup>3</sup> In jurisdictions in which express exceptions have not been established, judges often interpret existing evidentiary rules expansively.<sup>4</sup> Many commentators have criticized these express and implicit judicial exceptions as unjustified uses of bad-character evidence.<sup>5</sup>

In sexual misconduct cases, judges who desire to admit prior offense evidence without resorting to an express exception to the propensity evidence prohibition frequently rely on the plan theory of admissibility.<sup>6</sup> Recognized at common law<sup>7</sup> and in Military Rule of Evidence (MRE) 404(b),<sup>8</sup> the plan theory traditionally has permitted admission of uncharged misconduct evidence to prove the identity and the intent of the offender, or the occurrence of the criminal act itself, when both the uncharged and the charged acts were incident to the same criminal plan.<sup>9</sup> As expanded by courts tempted by prosecutors' offers of compelling evidence of uncharged sexual misconduct, however, the plan theory often is nothing more than a pretense for admitting evidence to show criminal propensity.<sup>10</sup>

With its decision in *United States v. Munoz*<sup>11</sup> the Court of Military Appeals confirmed its place in the ranks of courts that have expanded the plan theory. In this case, the accused appealed his conviction for sexually molesting his minor daughter. A majority of the Court of Military Appeals affirmed his conviction in a thinly veiled ratification of the use of propensity evidence. Senior Judge Everett assailed this decision in a vigorous dissent,<sup>12</sup> but even his dissenting opinion declined to advocate the traditionally narrow application of the plan theory.

This article will review MRE 404(b), the plan theory of admissibility, and the use of the plan theory in military practice. It then will examine *Munoz*, its impact, and a proposed legislative solution to the dilemma courts face in cases like *Munoz*.<sup>13</sup>

### Military Rule of Evidence 404(b)

Military Rule of Evidence 404(b) is identical to, and derives from, Federal Rule of Evidence (FRE) 404(b).<sup>14</sup> It prohibits the use of uncharged misconduct evidence as proof of a person's character to show that person's proclivity to commit a charged offense, but allows a trial judge to admit this evidence for other purposes.<sup>15</sup> The rule expressly lists several acceptable purposes, including proof of plan.<sup>16</sup>

<sup>2</sup>*Id.* § 4:14.

<sup>3</sup>See Chris Hutton, *Prior Bad Acts Evidence in Cases of Sexual Contact with a Child*, 34 S.D. L. Rev. 604, 614 (1989). Approximately 20 states recognize, or have recognized, this exception. See *id.* at 614 n.47. For a discussion of the exceptions used in California, Arizona, Rhode Island, and Florida, see Amber Donner-Froelich, *Other Crimes Evidence to Prove the Corpus Delicti of a Child Sexual Offense*, 40 U. Miami L. Rev. 217, 225-33 (1985). The express exception trend has been slowed and reversed in part by attacks on its rationales and by the adoption by many jurisdictions of Federal Rule of Evidence (FRE) 404(b), see *infra* note 14, which codifies the prohibition on propensity evidence. See Imwinkelried, *supra* note 1, §§ 4:16-18.

<sup>4</sup>See Donner-Froelich, *supra* note 3, at 221; James M.H. Gregg, *Other Acts of Sexual Misbehavior and Perversion as Evidence in Prosecutions for Sexual Offenses*, 6 Ariz. L. Rev. 212, 212-13 (1965).

<sup>5</sup>See Imwinkelried, *supra* note 1, §§ 4:13, 4:16; Note, *Evidence of Similar Transactions in Sex Crime Prosecutions—A New Trend Toward Liberal Admissibility*, 40 Minn. L. Rev. 694, 697-98 (1956). But see Office of Legal Policy, U.S. Dep't of Justice, Truth in Criminal Justice Series No. 4, *The Admission of Criminal Histories at Trial* (1986), reprinted in 22 U. Mich. J.L. Ref. 707 (1989).

<sup>6</sup>See also Edward J. Imwinkelried, *The Plan Theory for Admitting Evidence of the Defendant's Uncharged Crimes: A Microcosm of the Flaws in the Uncharged Misconduct Doctrine*, 50 Mo. L. Rev. 1 (1985).

<sup>7</sup>2 John H. Wigmore, *Evidence in Trials at Common Law* § 304 (James H. Chadbourne ed., rev. ed. 1979).

<sup>8</sup>Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 404(b) [hereinafter Mil. R. Evid.].

<sup>9</sup>See Charles T. McCormick, McCormick on Evidence § 190, at 559 (Edward W. Cleary et al. eds., 3d ed. 1984); see also *infra* notes 33-38 and accompanying text.

<sup>10</sup>See *infra* notes 42-47 and accompanying text; see also Imwinkelried, *supra* note 6, at 9-14.

<sup>11</sup>32 M.J. 359 (C.M.A.), cert. denied, 112 S. Ct. 437 (1991).

<sup>12</sup>*Id.* at 366.

<sup>13</sup>See *infra* notes 110-19 and accompanying text.

<sup>14</sup>Fed. R. Evid. 404(b); Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 404(b) analysis, app. 22, at A22-32 [hereinafter Mil. R. Evid. 404(b) analysis]. Federal Rule of Evidence 404(b) and MRE 404(b) provide,

Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

<sup>15</sup>Mil. R. Evid. 404(b).

<sup>16</sup>*Id.*

The exclusionary first sentence of the rule comports with MRE 404(a)'s general prohibition on the use of character evidence to prove conforming acts.<sup>17</sup> This prohibition protects against a verdict that is based on a person's status, rather than on his or her actual conduct.<sup>18</sup> If an accused's character were a proper consideration for court members, the presumption of innocence would have little meaning.<sup>19</sup> Admitting evidence of uncharged misconduct creates the risk that this crucial presumption will be diluted because the factfinder may be influenced by inferences of the accused's bad character, rather than by evidence relating directly to the charged offense.<sup>20</sup> Military Rule of Evidence 404(b) forbids military judges from taking this risk when admitting uncharged misconduct would serve no purpose other than to show an accused's criminal propensity.

The inclusionary second sentence of MRE 404(b), however, accepts the risk that a factfinder may draw improper character inferences from uncharged acts if the admission of this evidence would serve a purpose unrelated to establishing the accused's bad character. In *United States v. Brannan*<sup>21</sup> the Court of Military Appeals provided military judges with a three-step analysis for determining whether uncharged misconduct evidence should be admitted under MRE 404(b).<sup>22</sup> First, the evidence must tend to prove that the accused committed the uncharged act.<sup>23</sup> Second, the proponent must offer the evidence for a specific purpose other than showing the accused's criminal propensity.<sup>24</sup> Third, the danger of

unfair prejudice must not outweigh substantially the probative value of the evidence.<sup>25</sup>

In subsequent decisions, the court expounded on the first two steps of the *Brannan* analysis. In *United States v. Mirandes-Gonzales*<sup>26</sup> it held that a proponent of uncharged misconduct evidence can satisfy the first requirement simply by showing that a reasonable court member could believe that the accused committed the uncharged offense. Regarding the second step, the court held that the list of permissible purposes in MRE 404(b) is not exhaustive<sup>27</sup> and clarified that, to satisfy the second requirement, the proponent must offer the uncharged misconduct evidence to prove, or to rebut, a fact in issue at trial.<sup>28</sup> Finally, in *United States v. Watkins*,<sup>29</sup> the court stated that an appellate court may consider evidence of uncharged misconduct only for the purpose for which the military judge originally admitted it. The court may not treat the evidence as if it had been admitted for another purpose.

Military Rule of Evidence 404(b) has produced a great deal of appellate litigation since its inception in 1980.<sup>30</sup> Not surprisingly, most decisions involving the rule have addressed the second step of the *Brannan* analysis. To decide correctly whether uncharged misconduct evidence will serve a permissible purpose is a difficult judicial task. This difficulty derives in part from the tendency of judges at all levels to treat this critical evaluation of purpose as a labelling exercise, rather than a careful examination of the inferences that the

<sup>17</sup> Mil. R. Evid. 404(a) ("Evidence of a person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion").

<sup>18</sup> See Imwinkelried, *supra* note 1, § 1:03.

<sup>19</sup> See Petition for Writ of Certiorari at 7-8, *Munoz v. United States*, 112 S. Ct. 437 (1991) (No. 91-410). In his petition for certiorari, Munoz claimed that the military judge improperly admitted the evidence of Munoz's uncharged misconduct. See *id.* This error, Munoz claimed, violated his substantive due-process right to a fair trial by undermining the presumption of his innocence. See *id.*

<sup>20</sup> See Steven A. Saltzburg et al., *Military Rules of Evidence Manual* 460-61 (3d ed. 1991).

<sup>21</sup> 18 M.J. 181 (C.M.A. 1984).

<sup>22</sup> *Id.* at 182-83, 185.

<sup>23</sup> *Id.* at 182.

<sup>24</sup> *Id.* at 183. In *Brannan*, the court warned prosecutors against making "broad talismanic incantations of words such as intent, plan, or modus operandi" when offering uncharged misconduct evidence. See *id.* at 185. In *United States v. Brooks*, 22 M.J. 441, 444 (C.M.A. 1986), the Court of Military Appeals noted that a permissible purpose may not exist until after the defense case is presented.

<sup>25</sup> *Brannan*, 18 M.J. at 185; see also Mil. R. Evid. 404(b) analysis at A22-32.

<sup>26</sup> 26 M.J. 411 (C.M.A. 1988) (citing *Huddleston v. United States*, 485 U.S. 681 (1988)).

<sup>27</sup> *United States v. Castillo*, 29 M.J. 145 (C.M.A. 1989). The Manual for Courts-Martial also states that the list of purposes in MRE 404(b) is not exclusive. See Mil. R. Evid. 404(b) analysis at A22-32.

<sup>28</sup> *United States v. Gamble*, 27 M.J. 298 (C.M.A. 1988). *Gamble* involved a date rape prosecution in which the defense was consent. The military judge admitted evidence of an uncharged sexual assault to prove *modus operandi*. The Court of Military Appeals reversed, finding the uncharged misconduct evidence irrelevant because neither identity, nor intent, was at issue. *Id.* at 303-05.

<sup>29</sup> 21 M.J. 224 (C.M.A.) (applying *United States v. Renner*, 37 C.M.R. 329, 334 (C.M.A. 1967), to MRE 404(b)), *cert. denied*, 476 U.S. 1108 (1986).

<sup>30</sup> The Military Rules of Evidence entered into effect on 1 September 1980. See Manual for Courts-Martial, United States, 1969 (rev. ed.), ch. XXVII (C3, 1 Sept. 1980).

factfinder might draw from the uncharged misconduct.<sup>31</sup> This misplaced focus has led to arbitrary judicial reliance on the purposes listed in MRE 404(b), to a distortion of the traditional theories of admissibility, and, ultimately, to a widespread use of propensity evidence.<sup>32</sup> Nowhere is this result clearer than in cases dealing with the plan theory of admissibility.

### The Plan Theory of Admissibility

Traditionally, uncharged misconduct evidence has been admissible to identify the accused as the perpetrator, to prove the accused's criminal intent, or to prove that the proscribed act actually occurred.<sup>33</sup> In all three instances, the inferential link between the uncharged acts and the object of proof is not the accused's character, but a plan that required the accused to commit both the charged and the uncharged offenses to attain a specific goal.<sup>34</sup> The uncharged misconduct may be used to prove that a plan existed and that the existence of this plan decreases the probabilities that another actor was involved, that the accused's intent was innocent, or that the criminal act did not occur.<sup>35</sup> For example, in a trial for a robbery accomplished with a car, evidence that the accused stole the car would be admissible to prove that the accused planned to commit both offenses.<sup>36</sup> Once the plan is established, the offender's identity, his or her intent, or the robbery itself may

be inferred from the plan. The key to admissibility under this theory is the accused's adoption of both the charged and the uncharged misconduct as the means to attain a desired end.<sup>37</sup> Without this connection, the only logical link between the uncharged misconduct and the ultimate object of proof is the accused's apparent propensity to commit similar criminal acts.<sup>38</sup>

Charged and uncharged offenses need not be similar or contemporaneous for the plan theory to apply.<sup>39</sup> These factors, however, often serve as circumstantial proof of the existence of a plan when direct evidence of the plan is lacking.<sup>40</sup> For example, in a trial for the murder of an heir to a fortune, the prosecutor may seek to use evidence of the accused's uncharged murder of another heir to show that the accused planned to eliminate all the heirs and inherit the estate.<sup>41</sup> That both victims were heirs to the same fortune is a similarity that helps the prosecution to prove the existence of the plan.

More frequently, however, courts have used the similarities between charged and uncharged criminal acts erroneously. They have relied on similarity alone as a sufficient condition to admit evidence of uncharged misconduct under the plan theory, ignoring the theory's primary requirement that the accused must have committed the charged and the uncharged misconduct to further a common plan.<sup>42</sup> Accordingly, although these courts have used the label "plan," they actually have admitted the evidence under pattern or course of conduct

<sup>31</sup>United States v. Duncan, 28 M.J. 946 (N.M.C.M.R. 1989), is a rare example of a court's careful evaluation of the inference intended by the offer of uncharged misconduct evidence. The Navy-Marine Corps Court of Military Review stated that it would exclude uncharged misconduct if the inference intended includes the actor's character as a necessary step. *Id.* at 950.

<sup>32</sup>See *infra* notes 48-55 and accompanying text.

<sup>33</sup>McCormick, *supra* note 9, § 190, at 559.

<sup>34</sup>See Imwinkelried, *supra* note 1, §§ 3:20, 4:20, 5:33. Professor Imwinkelried distinguishes a sequential plan—in which one crime is a necessary predicate to another—from a chain plan—in which no offense is a necessary predicate, but in which a strong inference of connection exists. *Id.* § 3:22. In both plans, the accused must commit both the charged and the uncharged offenses to attain the goal of the plan. See, e.g., United States v. Carrol, 510 F.2d 507, 509 (2d Cir. 1975), *cert. denied*, 426 U.S. 923 (1976) (finding sequential plan to commit one robbery as a trial run for another robbery); People v. Glass, 114 P. 281 (Cal. 1910) (finding chain plan to bribe enough city supervisors to ensure a favorable vote on an issue). Common-law courts often referred to these types of plans as "common schemes." See Imwinkelried, *supra* note 1, § 3:20.

<sup>35</sup>See Imwinkelried, *supra* note 1, §§ 3:20, 4:20, 5:33.

<sup>36</sup>United States v. Leftwich, 461 F.2d 586 (3d Cir.), *cert. denied*, 409 U.S. 915 (1972); see also Lewis v. United States, 771 F.2d 454 (10th Cir. 1985) (admitting evidence of uncharged burglary of a garage, in which the accused stole a cutting torch and oxygen bottles, as proof that the accused planned to use the stolen equipment in charged robbery of a post office); United States v. Kelley, 635 F.2d 778 (10th Cir. 1980) (admitting evidence of uncharged burglary, in which the accused stole weapons from a pawn shop, as proof that the accused planned to commit charged bank robbery); Rice v. State, 605 S.W.2d 895 (Tex. Crim. App. 1980) (admitting evidence of uncharged burning of barn as proof that the accused planned to commit charged insurance fraud).

<sup>37</sup>See Wigmore, *supra* note 7, § 304.

<sup>38</sup>See *id.*

<sup>39</sup>See Imwinkelried, *supra* note 1, § 3:21. The uncharged misconduct need not occur before the charged offense. See, e.g., People v. Knox, 234 N.E.2d 128 (Ill. App. Ct. 1967) (admitting evidence of uncharged fraudulent loan in trial for larceny stemming from a prior loan).

<sup>40</sup>See Wigmore, *supra* note 7, § 304.

<sup>41</sup>See Imwinkelried, *supra* note 1, § 3:22.

<sup>42</sup>See, e.g., United States v. Sullivan, 911 F.2d 2 (7th Cir. 1990) (admitting evidence of prior bribery solicitations in trial for bribery); United States v. Baykowski, 615 F.2d 767 (8th Cir. 1980) (admitting evidence concerning pattern of burglaries in trial for storing stolen property); United States v. Masters, 622 F.2d 83 (4th Cir. 1980) (admitting evidence of prior illegal firearms dealing in trial for illegal firearms dealing); see also Imwinkelried, *supra* note 1, § 3:23.

theories of admissibility that essentially are indistinguishable from the prohibited propensity theory.<sup>43</sup>

The likelihood of a multistage plan in sexual misconduct cases is very low, especially in cases in which the accused has preyed on family members. Almost invariably, an accused's repeated sexual offenses can be explained only by his or her propensity to commit these offenses—not by a plan encompassing the charged and the uncharged offenses.

That the courts frequently apply the plan theory improperly in prosecutions of child molesters and other criminal sexual deviants is not surprising.<sup>44</sup> Compelling facts, problems of proof, and confidence in the reliability of prior sexual offense evidence have led to widespread judicial misuse of uncharged misconduct evidence in sexual misconduct cases.<sup>45</sup> All too often, the plan theory has been the vehicle of choice for admitting uncharged incidents of sexual misconduct simply because the uncharged incidents were similar to charged offenses.<sup>46</sup>

A practical explanation may account for the courts' repeated uses of the plan theory to admit uncharged sexual misconduct evidence. In many cases of familial child molestation in which the accused has denied the criminal conduct completely, the only disputed question is whether the criminal act actually occurred. Evidence of the accused's uncharged misconduct is not admissible to prove identity, intent, motive, or opportunity because these matters are not in issue. This evidence, however, is admissible under these circumstances to prove the existence of a plan.<sup>47</sup> Judges often find that skirting the propensity evidence prohibition by labelling a pattern or course of conduct a "plan" is much easier than overcoming the more obvious relevance problems that using other theories would entail.

## The Plan Theory in Military Practice

Confusion and inconsistency have been the hallmarks of judicial applications of the plan theory in military practice. In some cases, determining whether the court used the plan theory improperly or whether it intended to rely upon another theory entirely is difficult because the court used key terms imprecisely.<sup>48</sup> The most notable example of this imprecision is the occasional tendency of trial and appellate judges to confuse the terms "plan" and "*modus operandi*." Some judges use these terms as if they were interchangeable,<sup>49</sup> even though they actually represent two separate theories of admissibility. Evidence of *modus operandi*—often referred to as a criminal's signature—logically is relevant to prove an offender's identity and intent, but not to prove the criminal act itself.<sup>50</sup> To use that theory to admit uncharged misconduct when only the proscribed act is at issue is improper; in this instance, the factfinder can infer from evidence of the uncharged act only that the accused has a propensity for criminal behavior.<sup>51</sup> On the other hand, the plan theory may be used to admit uncharged misconduct evidence to prove that the criminal act occurred. Accordingly, confusing the terms "plan" and "*modus operandi*" increases the chance that evidence of uncharged misconduct will be admitted erroneously.

Even when judges clearly intended to find evidence admissible under the plan theory, their applications of the theory have been inconsistent. Only in a distinct minority of opinions have the Court of Military Appeals<sup>52</sup> and courts of military review<sup>53</sup> applied the plan theory correctly. Far more frequently, an opinion simply identified a series of similar offenses as evidence of a "plan"—even when these acts clearly lacked the essential connections to a common objective that make a plan a permissible noncharacter link between

<sup>43</sup> See Imwinkelried, *supra* note 1, § 3:23.

<sup>44</sup> See, e.g., *Hancock v. State*, 664 P.2d 1039, 1041 (Okla. Crim. App. 1983) (using plan theory to admit evidence of prior sexual acts when no evidence of a plan existed); *Daly v. State*, 665 P.2d 798, 801 (Nev. 1983) (using plan theory to admit uncharged sexual offense evidence when no evidence of a plan existed); *State v. Sills*, 317 S.E.2d 379, 384 (N.C. 1984) (same); see also Imwinkelried, *supra* note 6; Donner-Froelich, *supra* note 3, at 221.

<sup>45</sup> See *supra* notes 1-6 and accompanying text; Donner-Froelich, *supra* note 3, at 221-25.

<sup>46</sup> See *supra* note 6 and accompanying text.

<sup>47</sup> See Imwinkelried, *supra* note 1, § 4:21.

<sup>48</sup> See *infra* notes 49, 66-67 and accompanying text.

<sup>49</sup> See, e.g., *United States v. Holt*, 21 M.J. 946, 948 (A.F.C.M.R. 1986) (referring to evidence of a plan as "sufficiently distinctive to be viewed as the 'fingerprints' or the 'signature' of the person charged"), *petition for review denied*, 24 M.J. 54 (C.M.A. 1987); *United States v. Logan*, 18 M.J. 606, 608 (A.F.C.M.R. 1984) (stating that evidence offered to show a plan must establish *modus operandi*).

<sup>50</sup> See Imwinkelried, *supra* note 1, §§ 3:10, 4:01-21, 5:31.

<sup>51</sup> See *id.* § 4:03.

<sup>52</sup> See *infra* notes 60-61, 64-65 and accompanying text.

<sup>53</sup> See, e.g., *United States v. Caldwell*, 23 M.J. 748 (A.F.C.M.R.) (holding that evidence that the accused repeatedly coerced sexual favors from subordinates did not establish a plan), *petition for review denied*, 24 M.J. 451 (C.M.A. 1987); *United States v. Rappaport*, 19 M.J. 708 (A.F.C.M.R.) (holding that evidence of several adulterous affairs did not establish a plan), *aff'd*, 22 M.J. 445 (C.M.A. 1986).

uncharged misconduct and the object of proof.<sup>54</sup> Intentionally or unintentionally, these decisions have ratified the admission of propensity evidence in courts-martial. The pattern that emerges from this relatively small sample of cases resembles the decisional patterns in civilian jurisdictions.<sup>55</sup> A military court most likely will apply the plan theory improperly when an accused is charged with sexual misconduct and the court can find no other theory for admitting evidence of the accused's uncharged misconduct. A review of Court of Military Appeals decisions involving the plan theory illustrates this tendency clearly.

Before it decided *Munoz*, the Court of Military Appeals dealt with the plan theory of MRE 404(b) on several occasions. In *United States v. Brannan*<sup>56</sup> and *United States v. Brooks*,<sup>57</sup> two illegal drug cases, the court used only a similarity analysis to decide whether a plan existed. In *Brannan*, the court correctly found that no plan had existed, but reached this decision for the wrong reason. It apparently did not consider whether the accused actually resolved to commit several charged and uncharged marijuana transfers, uses, and possessions to accomplish a specific goal. The court stated only that the offenses had not been sufficiently similar to support the inference of a plan.<sup>58</sup> In *Brooks*, the court upheld the admission of evidence that the accused had committed two uncharged drug sales and an uncharged purchase. The court discussed only similarity in finding what it termed a plan encompassing the charged sale and all of the uncharged acts.<sup>59</sup>

The court's best discussion of the plan theory appears in a decision that it rendered on the day it decided *Brooks*. In *United States v. Rappaport*,<sup>60</sup> a case that involved a doctor charged with engaging in adulterous relationships with several of his patients, the court rejected the use of the plan theory to

admit evidence of an uncharged illicit affair between the doctor and another patient. The court found that the evidence of the similar affair "did not . . . establish a plan or overall scheme of which the charged offenses were part," but "tended [only] to establish propensity."<sup>61</sup> For the first time, the court shifted its focus from the similarity between charged and uncharged offenses to the inferences that a factfinder might draw from evidence of uncharged misconduct.

Significantly, *Rappaport* is the only plan theory case to come before the court at the request of the Government. The Air Force Court of Military Review had rejected the use of the plan theory in this case in an opinion<sup>62</sup> that obviously influenced the later decision of the Court of Military Appeals. Moreover, although *Rappaport* could be classed as a sexual misconduct case, it involved only consensual sexual activity among adults. Finally, Judge Sullivan, who later stretched the similarity analysis to the breaking point in *Munoz*, did not participate in *Rappaport*.<sup>63</sup> All these factors explain why *Rappaport* did not represent a turning point in the court's application of the plan theory. In short, *Rappaport* was a case without much at stake; it did not tempt the court to expand the plan theory as did later cases in which the propensity evidence was far more compelling.

After deciding *Rappaport*, the court returned its focus to the similarities between charged and uncharged offenses. In the decisions it rendered between *Rappaport* and *Munoz*, the court applied the plan theory properly in only one case. In *United States v. Thompson*<sup>64</sup> the court rejected the use of the plan theory to admit evidence of an accused's uncharged misconduct when the accused's motives for committing the uncharged offenses clearly differed from his motive for committing the charged offenses.<sup>65</sup> Of the five cases between *Rappaport* and *Munoz* in which the court affirmed improper

<sup>54</sup> See *infra* notes 56-59, 66-79 and accompanying text; see also *United States v. Ortiz*, 33 M.J. 549 (A.C.M.R. 1991) (holding that evidence of a prior course of child molestation could establish a plan); *United States v. Rath*, 27 M.J. 600 (A.C.M.R. 1988) (same), *petition for review denied*, 29 M.J. 284 (C.M.A. 1989); *United States v. Saul*, 26 M.J. 568 (A.F.C.M.R.) (same), *petition for review denied*, 27 M.J. 434 (C.M.A. 1988).

<sup>55</sup> See *supra* notes 44-46 and accompanying text.

<sup>56</sup> 18 M.J. 181 (C.M.A. 1984).

<sup>57</sup> 22 M.J. 441 (C.M.A. 1986). In *Brooks*, the uncharged drug sales and the uncharged drug purchase were similar because they were accomplished with the same accomplice. *Id.* at 443. No evidence suggested that the uncharged purchases involved the drugs that the accused subsequently sold in the charged sales. *Id.* If that had been the case, a true plan that would have encompassed both offenses might have existed.

<sup>58</sup> *Brannan*, 18 M.J. at 184.

<sup>59</sup> 22 M.J. at 443-44.

<sup>60</sup> 22 M.J. 445 (C.M.A. 1986). *Id.* at 445. The court found that the evidence of the uncharged offenses was not sufficiently similar to the charged offenses to establish a plan. *Id.* at 447.

<sup>61</sup> *Id.* at 447.

<sup>62</sup> *United States v. Rappaport*, 19 M.J. 708 (A.F.C.M.R.), *aff'd*, 22 M.J. 445 (C.M.A. 1986).

<sup>63</sup> *Rappaport*, 22 M.J. at 447.

<sup>64</sup> 30 M.J. 99 (C.M.A. 1990).

<sup>65</sup> *Id.* at 101-02. Thompson was charged, *inter alia*, with six specifications of making and uttering checks with intent to defraud. *Id.* at 100. At trial, the military judge admitted a sworn statement that Thompson had made one year before he committed the charged offenses; in this statement Thompson acknowledged writing several other bad checks. *Id.* Judge Cox, writing for an undivided court, noted, "The . . . determination that [the uncharged bad-check offenses] were part of an ongoing scheme was question-begging when the alleged problems which . . . otherwise . . . [might have provided] a motive or intent for writing bad checks were resolved over a year before" the accused committed the charged offenses. *Id.* at 101.

uses of the plan theory, three involved sexual misconduct. In the other two cases, *United States v. Jones*<sup>66</sup> and *United States v. Rushatz*,<sup>67</sup> the court affirmed the admission of evidence to prove spurious plans that, respectively, involved similar, but unrelated, drug transactions and frauds.

In two of the three sexual misconduct cases, *United States v. Hicks*<sup>68</sup> and *United States v. Reynolds*,<sup>69</sup> the court's applications of the plan theory were not only improper, but also unnecessary. Each of these acquaintance-rape cases involved uncharged, similar offenses that provided the Government with ample *modus operandi* evidence. Moreover, because intent was at issue in *Hicks* and *Reynolds*, the *modus operandi* theory was available to the court in each case. Nevertheless, the court essentially ignored this valid theory of admissibility and the absence of any evidence that Hicks and Reynolds actually formed plans encompassing their charged and uncharged offenses. Instead, the court looked to the similarities between the offenses to find plans in both cases. In *Hicks* the court also acknowledged that the uncharged misconduct was probative of *modus operandi*,<sup>70</sup> but in *Reynolds* the court relied exclusively on the plan theory.<sup>71</sup>

The third sexual misconduct case, *United States v. Mann*,<sup>72</sup> was an interesting precursor to *Munoz*. Like *Munoz*, Mann was charged with molesting his young daughter. Mann evidently had committed similar, uncharged acts of sexual abuse on the girl and on her brother over a five-year period. Because Mann denied that he had committed the charged acts,<sup>73</sup> neither identity, nor intent, was at issue. With only the

acts in dispute, the *modus operandi* theory was not available.<sup>74</sup> Instead, the military judge used the similarity between the charged and uncharged offenses to find a plan and then admitted the prior offenses.<sup>75</sup> On appeal, the Air Force Court of Military Review accepted without further analysis Mann's argument that the uncharged offenses were not "close enough in time, place, or circumstances to be relevant"<sup>76</sup> and rejected the finding that a plan had existed. Nevertheless, the court found the military judge's error harmless and affirmed Mann's conviction.<sup>77</sup> The Court of Military Appeals agreed with the military judge. It held that the accused had molested both children pursuant to a common plan, although it also remarked that it would have excluded the uncharged misconduct under MRE 403.<sup>78</sup> Like the Air Force court, the Court of Military Appeals found harmless error and affirmed Mann's conviction.<sup>79</sup> In a preview of his *Munoz* dissent, Senior Judge Everett echoed the Air Force court in finding no plan.<sup>80</sup>

### The Case of *United States v. Munoz*

The foregoing discussion illustrates clearly that the expansive interpretation that the Court of Military Appeals applied to the plan theory in *Munoz* did not originate in that decision. Although the court's earlier opinions were not completely consistent, they demonstrated the court's tendency to use a mere similarity between charged and uncharged offenses to find evidence of a plan, even when this similarity lacked logical relevance to prove anything other than criminal propensity. *Munoz*, however, was significant because no less

<sup>66</sup>32 M.J. 155 (C.M.A. 1991). In *Jones*, the accused routinely sold cocaine at the same street corner. Although Jones was charged with only one sale, the military judge admitted evidence of three uncharged sales that Jones had made at the same location as proof that Jones planned to distribute cocaine on that corner. *Id.* at 156-57. The Court of Military Appeals subsequently affirmed this ruling. *See id.* at 157.

<sup>67</sup>31 M.J. 450 (C.M.A. 1990). In *Rushatz*, the accused helped several lieutenants in successive officer basic courses to find off-post apartments. He told them that they lawfully could claim lodging expenses at the maximum per diem rate, even though they actually paid less than that amount for rent. He then charged the lieutenants "back rent" for the difference. The charged offenses involved lieutenants that were attending the same course. The military judge admitted evidence of an identical, uncharged fraud involving a lieutenant in an earlier course as proof of a plan. *Id.* at 457. The Court of Military Appeals affirmed. *See id.*

<sup>68</sup>24 M.J. 3 (C.M.A.), *cert. denied*, 484 U.S. 827 (1987).

<sup>69</sup>29 M.J. 105 (C.M.A. 1989).

<sup>70</sup>*Hicks*, 24 M.J. at 7. Hicks, a sergeant in the Marine Corps, was charged with raping a subordinate's girlfriend. Before he committed this offense, he allegedly extorted sexual favors from several female subordinates by abusing his authority as a noncommissioned officer. At trial, the military judge held that Hicks's prior, uncharged acts were relevant to prove a plan because Hicks used a similar form of coercion to effect the rape with which he was charged. *Id.* at 7. The Court of Military Appeals found no error and affirmed Hicks's conviction. *Id.* These acts legitimately could have been used to show the accused's intent to force the victim to enter his room. *See id.* at 4-5.

<sup>71</sup>*Reynolds*, 29 M.J. at 110. Reynolds had a very distinctive way of getting his dates to come to his quarters, where he would rape them. The court held that evidence of an uncharged rape was relevant to the issue of whether the accused had a "predatory *mens rea*," but it also concluded that this evidence was probative of a plan because the charged and uncharged offenses were so similar. *Id.* at 109-10.

<sup>72</sup>26 M.J. 1 (C.M.A.), *cert. denied*, 488 U.S. 824 (1988).

<sup>73</sup>*Id.* at 4.

<sup>74</sup>Evidence admitted under the similarity-based *modus operandi* theory logically is relevant only to prove identity and intent. *See generally* Imwinkelried, *supra* note 1, §§ 4.01-21.

<sup>75</sup>*Mann*, 26 M.J. at 4-5.

<sup>76</sup>*United States v. Mann*, 21 M.J. 706, 710 (A.F.C.M.R. 1985), *aff'd*, 26 M.J. 1 (C.M.A.), *cert. denied*, 488 U.S. 824 (1988).

<sup>77</sup>*Id.*

<sup>78</sup>*Mann*, 26 M.J. at 5.

<sup>79</sup>*Id.*

<sup>80</sup>*Id.* at 5-6.

than twelve years elapsed between the accused's charged and uncharged acts of sexual misconduct.<sup>81</sup> By finding that these remote, unconnected offenses were part of a "plan,"<sup>82</sup> the majority inadvertently exposed the illogic of the similarity analysis with a clarity lacking in previous decisions. This extreme expansion of the plan theory provoked a scathing dissent from Senior Judge Everett.<sup>83</sup> It also raised the question of whether *Munoz* effectively established an exception to the propensity evidence prohibition for prosecutions of individuals accused of sexual offenses. This question is particularly important in light of a radical proposal that Judge Cox advanced in his concurring opinion.<sup>84</sup>

Munoz was charged with committing indecent acts upon his ten-year-old daughter. The Government alleged that Munoz had placed his hands on her breasts or her vagina on four occasions in 1987.<sup>85</sup> The accused denied that he was guilty of any misconduct.<sup>86</sup> The trial counsel sought to admit evidence that the accused similarly had fondled the victim's two older sisters at least twelve years before he committed the charged offenses.<sup>87</sup> Finding that Munoz had acted in accordance with a plan to abuse his minor daughters sexually, the military judge admitted the testimony of one of the older daughters. The judge based this finding on the similarities he perceived between the charged and uncharged offenses—specifically, the comparable ages of the victims when Munoz molested them, the common situs of the offenses, the analogous circumstances surrounding the commission of each offense, and the similarities between the sexual acts themselves.<sup>88</sup> The military judge excluded the testimony of the other older daughter on MRE 403 grounds.<sup>89</sup>

### Chief Judge Sullivan's Lead Opinion

Chief Judge Sullivan's opinion continued the court's practice of using the plan theory to implement an expansive

approach to the admission of uncharged misconduct evidence. In finding a plan in the mere similarity between the charged and uncharged offenses,<sup>90</sup> the court remained within the textual framework of MRE 404(b), but abandoned the rule's logical underpinnings. Following a pattern typical of specious plan decisions, the Chief Judge declined to look for a logical connection between the accused's past misconduct and the charged offenses.

Chief Judge Sullivan cited Professor Wigmore's treatise to justify his reliance on the similarity between the charged and uncharged offenses.<sup>91</sup> Wigmore's book, however, simply discusses the use of common features of charged and uncharged offenses to prove that an accused planned to achieve a goal that required the accused to commit these offenses.<sup>92</sup> It should not be read to dispense with the requirement that the accused must have committed both the charged and the uncharged offenses to attain this goal. Similarity between the offenses sometimes may be used to prove circumstantially that the accused acted according to a plan,<sup>93</sup> but it does not define a plan per se. In *Munoz*—as in most sexual abuse cases—the accused did not strive to achieve a goal that he could accomplish only by committing the charged and the uncharged offenses. Each offense that Munoz committed was the product of a separate goal of sexual gratification that he accomplished through the execution of a separate plan. In this context, the similarity between the offenses at most proved only a *modus operandi*. The Government could prove no common plan because no common plan ever existed to be proven.

Chief Judge Sullivan addressed the twelve-year gap between the charged and uncharged offenses, but did so only in the context of his flawed, similarity-based analysis of the plan theory. He reasoned that, because the victim and her sister were abused at similar ages, the time that elapsed

<sup>81</sup> *Munoz*, 32 M.J. at 364. The majority described the period between the offenses as "at least 12 years." Senior Judge Everett described the period as "15 years" in his dissenting opinion. See *id.* at 367. In his petition for certiorari, Munoz claimed a gap of "12 to 18 years." See Petition for Writ of Certiorari at 3, *Munoz*, 112 S. Ct. at 437 (No. 91-410).

<sup>82</sup> *Munoz*, 32 M.J. at 364.

<sup>83</sup> *Id.* at 366.

<sup>84</sup> *Id.* at 365.

<sup>85</sup> *Id.* at 360.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 360, 363.

<sup>88</sup> *Id.* at 363.

<sup>89</sup> *Id.* at 361.

<sup>90</sup> *Id.* at 363-64.

<sup>91</sup> *Id.* at 363.

<sup>92</sup> See Wigmore, *supra* note 7, § 304.

<sup>93</sup> See *supra* notes 40-41 and accompanying text.

between the incidents in which they were abused was of no concern.<sup>94</sup> When examined under the traditional plan analysis, however, the twelve-year gap reveals the extent to which the majority had to stretch to affirm the admission of the uncharged misconduct evidence. That the accused acted pursuant to a common plan would have been unlikely even if only a short period had passed between the offenses. The twelve-year gap between the offenses, however, rendered the notion of a plan entirely insupportable. To claim that Munoz contemplated fondling his youngest daughter when he fondled the older one is absurd—the victim of the charged acts actually had not been born when Munoz molested her older sister.<sup>95</sup>

### *Judge Cox's Concurring Opinion*

Judge Cox's opinion<sup>96</sup> essentially called on the Court of Military Appeals to abandon MRE 404(b) in sexual offense cases. Under his approach, evidence that an accused committed an uncharged sexual offense similar to an offense with which the accused was charged ordinarily would be admissible, subject only to the MRE 403 balancing test.<sup>97</sup> He described this type of evidence—especially evidence of deviant sexual misconduct—as “powerful circumstantial evidence” that often is needed to corroborate the victim's testimony about crimes committed in “secrecy and privacy.”<sup>98</sup> Judge Cox's proposed exception to MRE 404(b) also was motivated by his apparent concern over the intellectual dishonesty of admitting evidence of similar, uncharged sexual offenses under the guise of a plan and by his manifest doubt that “evidence about one's sexuality is really ‘character evidence.’”<sup>99</sup> Significantly, these justifications resemble those used in civilian jurisdictions that have recognized express exceptions to the prohibition on propensity evidence.<sup>100</sup> Finally, Judge Cox drew support for his position from pending federal legislation in which several leading

lawmakers have proposed the creation of a new Federal Rule of Evidence.<sup>101</sup> Under proposed FRE 414, evidence of uncharged child molestations could be admitted in a prosecution of that offense to prove any matter to which the evidence is relevant, including the accused's proclivity to abuse children sexually.

Judge Cox's concurring opinion is both refreshing and troubling. The Court of Military Appeals repeatedly has affirmed the admissions of propensity evidence under the pretext that this evidence tended to prove plans.<sup>102</sup> Judge Cox properly demanded an end to this charade. Even so, his proposed solution to the dilemma that military judges face in cases like *Munoz* is wrong. Even if the military justice system should recognize an exception to MRE 404(b), this exception should not be created by the Court of Military Appeals. Although Judge Cox's approach would moderate the current distortion of the plan theory by limiting that distortion to sexual offenses, it also would run contrary to the law. Absent a conflict with the Constitution or the Uniform Code of Military Justice, a provision of the Military Rules of Evidence is binding authority<sup>103</sup> that should be followed by judges at all levels.

### *Senior Judge Everett's Dissent*

Although Senior Judge Everett strongly criticized the majority decision,<sup>104</sup> his opinion best may be viewed as limiting, rather than repudiating, the majority's expansive approach to the plan theory. After pointing out the illogic of finding a plan when the offenses occurred so many years apart, the Senior Judge stated that he also was uncomfortable with the majority's conclusion that “enough common factors existed between the charged offenses and the prior acts that a comparison demonstrate[d] a common scheme or plan.”<sup>105</sup> This concern with similarity in a case in which no common

<sup>94</sup> *Munoz*, 32 M.J. at 364.

<sup>95</sup> *Id.* at 360, 367; see also discussion *supra* note 82.

<sup>96</sup> *Munoz*, 32 M.J. at 365.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 365, 366.

<sup>99</sup> *Id.* at 365 n.1.

<sup>100</sup> See *supra* note 3 and accompanying text.

<sup>101</sup> *Munoz*, 32 M.J. at 366 n.2; see *infra* notes 112-17 and accompanying text.

<sup>102</sup> See *supra* notes 56-59, 66-79 and accompanying text.

<sup>103</sup> See Uniform Code of Military Justice art. 36, 10 U.S.C. § 836 (1988); Mil. R. Evid. 103; Manual for Courts-Martial, United States, 1984, analysis, app. 22, at A21-2; see also Frederic I. Lederer, *The Military Rules of Evidence: Origins and Judicial Interpretation*, 130 Mil. L. Rev. 5, 27 (1990).

<sup>104</sup> *Munoz*, 32 M.J. at 367.

<sup>105</sup> *Id.*

features could demonstrate the logical connection between the offenses that would have typified a true plan indicates that Senior Judge Everett did not abandon the court's spurious plan analysis. His discussion of similarity shows that he did not appreciate how narrowly the plan theory should be applied or how rarely the theory is appropriate to use in cases like *Munoz*.

Read together, Senior Judge Everett's dissents in *Munoz* and in *Mann*<sup>106</sup>—which involved a five-year gap between the charged and uncharged offenses—imply that the Senior Judge would find a plan whenever the charged and uncharged offenses are similar and close in time. This interpretation comports with his finding of a plan in several cases,<sup>107</sup> based solely on the similarities between the charged and uncharged offenses, when these offenses were not as remote as the offenses in *Munoz* or *Mann*. Although Senior Judge Everett cited *Rappaport*<sup>108</sup> in his *Munoz* dissent,<sup>109</sup> he did so in the context of his discussion of common features. All he truly appeared to say was that the offenses in *Rappaport* were not sufficiently similar to justify the finding of a plan. He made no effort to vindicate the traditional plan analysis.

### A Legislative Solution to the *Munoz* Dilemma

Several members of Congress are aware of the dilemma that a judge faces when a correct application of existing rules of evidence would require the judge to exclude compelling evidence of an accused's prior sexual offenses. Intending to ensure the admission of what they believe to be relevant

propensity evidence without forcing judges to bend or break the law, these legislators proposed an amendment to the Federal Rules of Evidence.<sup>110</sup> The amendment, featured in seven bills introduced in 1991,<sup>111</sup> would create FRE 413 and FRE 414. These new rules would permit federal trial judges to admit evidence of uncharged sexual assaults and child molestations for any relevant purpose in prosecutions for those crimes.<sup>112</sup> Although one relevant purpose would be to show an accused's proclivity to commit sexual offenses,<sup>113</sup> the text of the proposed amendments indicates that a judge still could exclude uncharged acts under FRE 403.<sup>114</sup> Because these rules would override FRE 404(b),<sup>115</sup> judges no longer would feel compelled to expand the plan theory in the sexual offense prosecutions to which the new rules would apply. In other cases, however, FRE 404(b) still would prohibit propensity evidence. In these cases, the judicial temptation to admit evidence of uncharged misconduct under the pretense that it proves the existence of a plan would survive unabated.

Whether these proposed rules should be added to the Military Rules of Evidence is a question beyond the scope of this article. The dilemma *Munoz* poses is clear, but this change should be made only if Congress and the President are convinced that the juridical interest in barring propensity evidence from the courtroom<sup>116</sup> is less compelling in prosecutions of sex offenders than in other criminal cases. This question presently is the subject of heated debate in the legal community.<sup>117</sup> Proponents of the new rules argue that similar offense evidence is highly relevant and necessary in sexual offense prosecutions.<sup>118</sup> Opponents respond that the problems of proof and recidivism in this area are not sufficiently unique

<sup>106</sup>26 M.J. 1, 5 (C.M.A.), cert. denied, 488 U.S. 824 (1988).

<sup>107</sup>See *United States v. Jones*, 32 M.J. 155 (C.M.A. 1991); *United States v. Rushatz*, 31 M.J. 450 (C.M.A. 1990); *United States v. Reynolds*, 29 M.J. 105 (C.M.A. 1989); *United States v. Hicks*, 24 M.J. 3 (C.M.A. 1987); *United States v. Brooks*, 22 M.J. 441 (C.M.A. 1986); see also *supra* notes 57, 66-67, 70-71 and accompanying text.

<sup>108</sup>22 M.J. 445 (C.M.A. 1986).

<sup>109</sup>*Munoz*, 32 M.J. at 367.

<sup>110</sup>See 137 Cong. Rec. S4925-03 (daily ed. Apr. 24, 1991) (letter from W. Lee Rawls, Assistant Attorney General for Legislative Affairs, to Sen. Dole).

<sup>111</sup>S. 472, 102d Cong., 1st Sess. § 231 (1991); H.R. 1149, 102d Cong., 1st Sess. § 231 (1991); H.R. 1400, 102d Cong., 1st Sess. § 801 (1991); S. 635, 102d Cong., 1st Sess. § 801 (1991); S. 1151, 102d Cong., 1st Sess. § 801 (1991); S. 1335, 102d Cong., 1st Sess. § 301 (1991); H.R. 3463, 102d Cong., 1st Sess. § 1 (1991).

<sup>112</sup>Proposed FRE 413 provides, "In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant." See, e.g., S. 472, 102d Cong., 1st Sess. § 231 (1991). Proposed FRE 414 makes the same provision for child molestation prosecutions. *Id.*

<sup>113</sup>See 137 Cong. Rec. S2146, S2206 (daily ed. Feb. 21, 1991) (statement of Sen. Dole).

<sup>114</sup>Proposed FRE 413 and proposed FRE 414 provide, "This rule shall not be construed to limit the admission or consideration of evidence under any other rule." See, e.g., S. 472, 102d Cong., 1st Sess. § 231 (1991).

<sup>115</sup>See 137 Cong. Rec. S3191, S3239-40 (daily ed. Mar. 13, 1991) (statement of Sen. Thurmond).

<sup>116</sup>See *supra* text accompanying notes 18-20.

<sup>117</sup>See *supra* note 3 and accompanying text.

<sup>118</sup>See 137 Cong. Rec. E3503-04 (daily ed. Oct. 21, 1991) (statement of Rep. Molinari). Representative Molinari commented that "[s]exual assault and child molestations do not ordinary [sic] occur in the presence of multiple credible witnesses," adding that "the perpetrators of these crimes are often free to repeat their offenses with other unsuspecting victims." *Id.* at E3504.

to justify the use of propensity evidence in one class of offenses.<sup>119</sup> The outcome of this debate—not just concern over judges who refuse to follow existing law—should determine whether these changes are made.

### Conclusion and Recommendations

Recent changes to the composition of the Court of Military Appeals<sup>120</sup> may bring new and unforeseen revisions to the court's interpretation of the plan theory. At present, the court has continued to eschew the traditional analysis, failing to recognize that the accused's charged and uncharged offenses necessarily must be linked to a common goal. Instead, the court has applied a spurious "plan" analysis that focusses only on similarities between the offenses.

The breadth of the analysis the court may adopt in future decisions cannot be predicted.<sup>121</sup> In *Munoz*, Chief Judge Sullivan appeared willing to find a plan whenever evidence of similar conduct exists, no matter how much time has elapsed between the uncharged and charged offenses.<sup>122</sup> Senior Judge Everett, who would rely on simple similarity to find a plan only when the charged and uncharged acts are close in time, has left the court.<sup>123</sup> In cases of sexual misconduct, Judge Cox would bypass MRE 404(b) and the plan theory alto-

gether. He would admit similar acts of uncharged misconduct freely, subject only to the MRE 403 balancing test.<sup>124</sup>

The scope of the plan theory in the military is a matter of more than academic interest. A return to the narrow traditional analysis would ensure that evidence of an accused's uncharged misconduct would be admitted only to prove an issue other than criminal propensity.<sup>125</sup> Many military judges, however, currently admit as proof of plans uncharged misconduct evidence that actually proves nothing but propensity. This practice conflicts not only with common-law evidentiary principles, but also with MRE 404(b). Although it occurs most commonly in cases of sexual misconduct, courts also expand the plan theory in prosecutions for other offenses.<sup>126</sup>

If the uncharged misconduct doctrine must be changed to eliminate problems inherent in the prosecution of sexual offenses, this change should not be made by the judiciary. Proposed changes<sup>127</sup> that would permit military judges to admit propensity evidence in cases of this sort should be studied carefully. If they are necessary, they should be added to the Military Rules of Evidence by executive order. Until then, the Court of Military Appeals, the courts of review, and military judges should apply the traditional plan theory analysis to avoid admitting propensity evidence in violation of MRE 404(b).

<sup>119</sup> See Imwinkelried, *supra* note 1, § 4:16. Professor Imwinkelried wrote, "Many crimes are usually committed in a clandestine fashion. Sex crimes are no more difficult to prove than many theft offenses." *Id.*

<sup>120</sup> Judge Crawford, Judge Wiss, and Judge Gierke recently joined the court. See 137 Cong. Rec. S16, 783 (daily ed. Nov. 14, 1991). Senior Judge Everett's term expired on 30 September 1991, but he continued to serve in an active senior status during the transition to a five-judge court. Eugene R. Sullivan et al., Report of the United States Court of Military Appeals (1990), reprinted in 32 M.J. CXXV, CXXVIII (1991).

<sup>121</sup> In *United States v. Bender*, 33 M.J. 111 (C.M.A. 1991), the court's only plan-theory case since *Munoz*, the court upheld a military judge's decision to admit evidence of uncharged acts of child molestation as probative of a plan of child sexual abuse. Senior Judge Everett dissented, arguing that no plan ever existed. See *id.* at 112. The Senior Judge, however, based his opinion on the dissimilarity between the charged offenses and the uncharged offenses. *Id.* As in *Munoz*, the Senior Judge did not attempt to advance the traditional plan analysis. In *United States v. Ortiz*, 33 M.J. 549, 554 (A.C.M.R. 1991), the Army Court of Military Review cited *Munoz* when it upheld the admission of evidence of the accused's prior, similar acts of child molestation under a spurious plan theory.

<sup>122</sup> See *supra* text accompanying notes 90-95.

<sup>123</sup> See *supra* note 120 and text accompanying notes 104-09.

<sup>124</sup> See *supra* text accompanying notes 96-103.

<sup>125</sup> See *supra* text accompanying notes 33-38.

<sup>126</sup> See *supra* notes 56-59, 66-67 and accompanying text.

<sup>127</sup> See *supra* notes 111-15 and accompanying text.

## USALSA Report

United States Army Legal Services Agency

### The Advocate for Military Defense Counsel

#### DAD Notes

#### Blowing the Whistle on Morality Cops— Defending Against Manufactured Offenses Under Uniform Code of Military Justice Articles 133 and 134

The mere assertion by a prosecutor or commander that certain conduct is punishable under the provisions of articles 133 or 134 of the Uniform Code of Military Justice<sup>1</sup> (UCMJ) does not make the conduct criminal. An attempt to criminalize morally unsavory, but otherwise legal, conduct can, and

<sup>1</sup> Uniform Code of Military Justice arts. 133, 134, 10 U.S.C. §§ 933, 934 (1988) [hereinafter UCMJ].

should, be thwarted on the constitutional ground of lack of notice that the conduct is punishable.

<sup>10</sup>In *Parker v. Levy*,<sup>12</sup> the United States Supreme Court upheld the validity of UCMJ articles 133 and 134. In doing so, it established guidelines on what constitutes sufficient notice of criminality under these articles.

In *Levy*, the appellant claimed that articles 133 and 134 were unconstitutionally overbroad and void for vagueness. Levy, a dermatologist, had been convicted for violating these articles for failing to obey a direct order to instruct Special Forces medical trainees, for telling black trainees to refuse to go to Vietnam, and for encouraging these trainees to protest the war and their parts in it.<sup>3</sup>

In affirming Levy's conviction, the Supreme Court equated the standard of review for articles 133 and 134 with the standard the Court applied to criminal statutes regulating economic affairs in *United States v. Harriss*<sup>4</sup> and *Robinson v. United States*.<sup>5</sup> The Court then pointed to two factors that led it to uphold the facial validity of the UCMJ articles. First, the special circumstances of military society that differentiate military life from its civilian counterpart dictate that military authorities must have broader latitude to regulate the conduct of military members.<sup>6</sup> Second, through decisional law and interpretation of military custom, the military courts have narrowed the articles' scopes; moreover, these decisions gradually have put service members on notice that the articles proscribe certain conduct.<sup>7</sup> The Court concluded that Levy

2417 U.S. 733 (1974).

<sup>3</sup>*Id.* at 737-38.

<sup>4</sup>347 U.S. 612, 617 (1954) ("criminal responsibility should not attach where one could not reasonably understand that his [or her] contemplated conduct is proscribed").

<sup>5</sup>324 U.S. 282 (1945) (in determining sufficiency of notice, statute must be examined in light of defendant's conduct).

<sup>6</sup>*Levy*, 417 U.S. at 744.

<sup>7</sup>*Id.* at 754.

<sup>8</sup>*Id.* at 756-57.

<sup>9</sup>See, e.g., *United States v. Cannon*, 13 M.J. 777, 778 (A.C.M.R. 1982) ("Due process requires that a criminal statute provide fair notice to persons of common intelligence what conduct is proscribed and also that innocent or constitutionally protected conduct not be made criminal").

<sup>10</sup>32 M.J. 941 (N.M.C.M.R. 1991), *aff'd on other grounds*, 34 M.J. 174 (C.M.A. 1992).

<sup>11</sup>The specification averred, in pertinent part,

In that Staff Sergeant Dwight Henderson . . . did at the apartment of said Staff Sergeant Henderson . . . wrongfully have sexual intercourse with the following persons: Miss D.J.; Miss K.H.; and Miss M.B.; students at Waltham High School . . . under instruction as Marine Junior ROTC Cadets . . . said conduct under the circumstances being prejudicial to good order and discipline in the Armed Forces and being of a nature to bring discredit upon the Armed Forces.

*Id.* at 943.

<sup>12</sup>*Id.* at 945.

<sup>13</sup>*Id.* at 944.

<sup>14</sup>20 M.J. 155 (C.M.A. 1985).

clearly knew that he was violating the proscriptions of articles 133 and 134.<sup>8</sup>

The *Levy* decision, however, is not the end of the story. Although the military courts have echoed the principle of *Robinson and Harriss*,<sup>9</sup> military accused often are exposed to criminal liability under the general articles for engaging in otherwise innocuous acts. For instance, in *United States v. Henderson*,<sup>10</sup> a Marine recruiter was convicted under article 134's general provision for having consensual, nondeviate sexual intercourse with young women who were over the age of consent.<sup>11</sup> The Navy-Marine Corps Court of Military Review reversed Henderson's conviction, holding that, even under the "relaxed standards" of *Parker v. Levy*, the Government had failed to prove that the conduct was criminal or that the accused had known that sexual intercourse was prohibited under the circumstances described at trial.<sup>12</sup> The court explained that, "[a]lthough it is clear that appellant's conduct was disreputable and service discrediting, it does not follow inexorably that the general article was violated by his conduct. What may be discrediting in the moral sense is not always criminal in the legal sense."<sup>13</sup>

In *United States v. Johanns*,<sup>14</sup> the accused, an Air Force captain, was convicted under UCMJ article 133 for engaging in consensual, nondeviate sexual intercourse with an enlisted woman, who neither was assigned to his unit, nor was his subordinate in the chain of command. The Court of Military Appeals, finding that no custom or regulation gave the accused notice that his conduct was proscribed, affirmed the

Air Force Court of Military Review's dismissal of the pertinent specifications as violative of the standards set forth in *Levy*.<sup>15</sup>

Certainly, a marked difference exists between conduct that is disgraceful or stupid and conduct that constitutes a crime. Sometimes, however, the distinction is blurred by prosecutors and military judges. For instance, in one recent case, the accused received an "any soldier" letter from a fourteen-year-old female while he was on duty in Saudi Arabia. The young woman gave a physical description of herself, detailed her interests, and requested a letter in return. She signed the letter, "Love, G." She did not indicate her age in the letter, but said merely that she attended the "Langston Hughes School." The accused wrote back, supplying a physical description of himself and listing his interests, which included going to nude beaches, observing the works of "David Hamilton" (apparently a photographer) and participating in volksmarches. He indicated he would like a picture of her—nude, if she wished—and remarked that he would give her his picture if she wanted one. The letter contained no graphic language or imagery and, other than the mention of nude beaches and photos, contained nothing that could be considered pornographic. Unfortunately, G's mother found the accused's letter hidden in G's room. Furious at the sexual overtones of the letter, she wrote to the accused's commander. The commander and the accused responded by writing a letter of apology. This apology, however, did not end the matter. The accused subsequently was prosecuted under UCMJ article 133 for writing the letter, which the trial counsel characterized in the specification as an "act[] dishonoring, disgracing and compromising . . . the accused's standing as an officer." Ultimately, the accused was convicted, despite the defense counsel's arguments that the conduct did not amount to an offense. The defense counsel, however, did not argue that the accused had no notice that writing such a letter was a crime or that it even could be considered criminal conduct. Had it been used, this argument might have effected a different result.

Rather than wait for relief on appeal, defense counsel should litigate notice issues at trial, when counsel best can develop facts supporting the conclusion that the accused had no reasonable notice that the conduct charged under a general article was proscribed. The potential benefit is twofold. First, the trial judge may grant relief on a motion *in limine*, which would make defending any remaining charges much easier.

<sup>15</sup>*Id.* at 161.

<sup>16</sup>34 M.J. 595 (A.C.M.R. 1992).

<sup>17</sup>*Id.* at 596.

<sup>18</sup>*Id.*

<sup>19</sup>*United States v. Peek*, 24 M.J. 750 (A.C.M.R. 1987).

<sup>20</sup>*United States v. Tillery*, 26 M.J. 799, 800 (A.C.M.R. 1988); see also Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1106(f)(2) [hereinafter R.C.M.].

<sup>21</sup>*Gauthier*, 34 M.J. at 596.

Second, even an unsuccessful attack may yield enough facts and sources of error to provide a solid foundation upon which to appeal. Forcing the trial judge to address the distinction between disgraceful conduct and criminal conduct may lead to acquittals and, more importantly, may make prosecutors more reluctant to play "morality cop." Captain Andrea.

### Ineffective Assistance of Counsel— Who Has Standing to Raise It?

The Army Court of Military Review recently addressed yet another issue dealing with ineffective assistance by a trial defense counsel. In *United States v. Gauthier*<sup>16</sup> the Army court held that no error occurred when the staff judge advocate (SJA) served his posttrial recommendation on the appellant's trial defense counsel, even though the SJA knew that the appellant's wife had accused the defense counsel of rendering ineffective assistance to the appellant at trial.

The appellant's wife wrote letters to the convening authority and other members of the appellant's chain of command, alleging that the appellant had received ineffective assistance at trial from his trial defense counsel. Despite these letters, the staff judge advocate served his posttrial recommendation on the defense counsel. The defense counsel subsequently requested a delay in submitting posttrial matters because of the allegations of ineffectiveness. Following the guidance of his regional defense counsel, the defense counsel then contacted the appellant. The appellant informed the attorney that he had no knowledge of his wife's allegations and that he did not agree with her.<sup>17</sup> He insisted that the trial defense counsel continue to represent him.<sup>18</sup>

Clearly, an accused is entitled to the effective assistance of counsel during the posttrial processing of his or her case.<sup>19</sup> If an accused alleges ineffective assistance of counsel before the SJA serves the posttrial recommendation upon the defense counsel, the SJA either must ensure that the appellant is satisfied with the continued representation of the trial defense counsel or must submit the posttrial recommendation to a different attorney.<sup>20</sup>

In *Gauthier*, however, the Army court found that the trial defense counsel ably represented the appellant.<sup>21</sup> Moreover, it remarked that the appellant himself never alleged that his trial

defense counsel had failed to represent him adequately, noting that the appellant actually had demanded that the trial defense counsel continue to serve as his attorney.<sup>22</sup> The court concluded that, although the appellant's wife may have believed the appellant's counsel was ineffective, she lacked standing to raise the issue.<sup>23</sup>

Common sense appears to have dictated the court's holding in *Gauthier*. Nevertheless, similar issues of standing often arise in courts-martial. A defense counsel must remember that his or her responsibility is to the client—not to the client's family. Captain Desmarais.

#### How Far Must a Soldier Go in Attempting to Pay a Fine?

In *United States v. Tuggle*<sup>24</sup> the Court of Military Appeals addressed the proper imposition of contingent confinement for the willful failure to pay a fine. When a fine is ordered executed, the accused immediately is liable to the federal government for the entire fine.<sup>25</sup> Contingent confinement may be used to sanction a soldier who willfully fails to pay a fine.<sup>26</sup> Confinement, however, may not be imposed if the soldier has made good-faith efforts to pay, but is unable to do so because he or she is indigent.<sup>27</sup> Accordingly, a question arises: What efforts does the law demand of a service member as adequate demonstrations of good faith?<sup>28</sup>

In *Tuggle*,<sup>29</sup> the Army Court of Military Review took a very narrow approach in answering this question. The court held that the appellant was not indigent and did not make a bona fide effort to pay the adjudged fine. It noted that he had declined to accept a loan offered by his mother—who would have had to put a second mortgage on her home to obtain these funds—and had refused to surrender his automobile, suspend voluntary support payments for his children and

mother; cancel his life insurance policy and obtain its cash value, or stop allotments from his pay for life insurance and for payments on a bond.<sup>30</sup> The Army court also found no merit in the appellant's offer to pay his fine in installments by means of an allotment.<sup>31</sup>

The Court of Military Appeals took a more reasoned and compassionate approach, stating that a strong argument could be made that Tuggle lacked sufficient liquid assets to pay the fine.<sup>32</sup> The court examined the issue of indigence methodically. It first examined Tuggle's salary, looking at his accrued wages from the time that the sentence was adjudged until the time that the fine became due. It then considered Tuggle's assets and their market values. The court commented that the sale or voluntary repossession of Tuggle's most valuable possession—an automobile that was encumbered by a lien—would have reduced Tuggle's debt, but would not have produced sufficient funds to pay the fine.<sup>33</sup>

The court's analysis in *Tuggle* gives defense counsel a strong argument that an accused's possession of numerous or valuable possessions is not dispositive of a determination of indigence. The reviewing authority must focus on whether the accused's possessions realistically can be used to satisfy the fine. A fair reading of the opinion indicates that a service member need not sell all of his or her property if the net proceeds of the sale would not be sufficient to pay the fine.

The court also considered Tuggle's financial obligations. It intimated that, to induce a convening authority to disregard the effects of support payments to children and family members on a service member's ability to pay a fine, the Government should have to establish on the record that the payments are purely voluntary and are not legal or moral obligations.<sup>34</sup> The lack of a court order for support is not dispositive of this issue. The court reasoned that child support payments and

<sup>22</sup>*Id.*

<sup>23</sup>*Id.*

<sup>24</sup>34 M.J. 89 (C.M.A. 1992).

<sup>25</sup>R.C.M. 1003(b)(3) discussion.

<sup>26</sup>R.C.M. 1003(b)(3); see also *Bearden v. Georgia*, 461 U.S. 660, 668 (1983); *Williams v. Illinois*, 399 U.S. 235 (1970); *Griffin v. Illinois*, 351 U.S. 12 (1955).

<sup>27</sup>R.C.M. 1113(d)(3); *United States v. Rascoe*, 31 M.J. 544 (N.M.C.M.R. 1990); see also 21 Am. Jur. 2d, *Fines* §§ 617-618 (1981); 24 C.J.S., *Particular Punishments* § 1597 (1989); J.W. Thomey, Annotation, *Indigency of Offender as Affecting Validity of Imprisonment as Alternative to Payment of Fine*, 31 A.L.R.3d 926 (1970).

<sup>28</sup>See, e.g., *Standards for Criminal Justice* § 18-7.4 (Am. Bar Ass'n 2d ed. 1986); *id.* commentary.

<sup>29</sup>*United States v. Tuggle*, 31 M.J. 778 (A.C.M.R. 1990), *aff'd in part and rev'd in part*, 34 M.J. 89 (C.M.A. 1992).

<sup>30</sup>*Id.* at 780-81.

<sup>31</sup>*Id.* at 781.

<sup>32</sup>*Tuggle*, 34 M.J. at 92.

<sup>33</sup>*Id.* at 92 n.8. "The market value of the car was \$19,000.00, while the total amount that Tuggle owed [on the car] was over \$23,000.00." *Id.* at 92.

<sup>34</sup>*Id.* (citing 59 Am. Jur. 2d, *Parent and Child* §§ 41, 91 (1987)).

payments for the support of parents normally are such worthy expenditures that, in the absence of contrary evidence on the record, they will not be curtailed to permit a service member to pay a fine.<sup>35</sup>

Finally, the court considered the possibility that Tuggle could have obtained loans from family members and the impact of this possibility on his ability to pay the fine. The court stated that it will not impose a duty on family members to mortgage their homes to satisfy fines adjudged upon service members.<sup>36</sup> This holding is particularly important because it sharply defines how far an individual must go to demonstrate that he or she is acting in good faith in his or her attempt to pay a fine. After *Tuggle*, a service member who lacks sufficient assets to pay a fine may be able to illustrate good faith simply by applying for a loan.

The Court of Military Appeals also considered whether a person who cannot pay a fine in one lump sum may demonstrate good faith by proposing to pay the fine in installments, over an extended period. Tuggle had offered to make a series of voluntary allotments from his pay to satisfy the fine.<sup>37</sup> The Court of Military Appeals found that, by rejecting this proposal without reason, the convening authority denied Tuggle an opportunity to make a good-faith effort to pay the fine.<sup>38</sup> Looking at the purpose of the fine, the court concluded that payment over a period of time was an acceptable alternative available to the government and is a widely accepted principle in the federal arena.<sup>39</sup> It suggested that, if collection of the fine became a problem, the Government could petition the court to modify, remit, defer, or extend the payment date of the fine.<sup>40</sup> This comment strongly implies that, if the purpose of a fine is to prevent an accused's unjust enrichment, a convening authority should examine alternative means by which to attain this objective before determining that a service member is not acting in good faith.

When a convicted accused faces the possibility of contingent confinement, a careful examination of the accused's obligations, his or her income, and the realistic value of his or her assets is essential to determining whether a claim of indigence

is appropriate. If liquidating the accused's assets will not satisfy the entire fine by the fine's due date, the accused should pursue a claim of indigence. In making this assessment, the accused and the defense counsel should note that an asset should be given only the cash value that it actually can generate by the due date of the fine.

If an accused has incurred numerous obligations, the trial defense counsel should propose a partial payment schedule in the form of an allotment. This solution prevents disruption of essential support payments and permits the accused to retain his or her personal belongings. Moreover, it is an intelligent alternative to placing the accused in confinement, which automatically would reduce the accused to the pay grade of E-1.<sup>41</sup> Captain Tall.

### Clerk of Court Note

### Court-Martial and Nonjudicial Punishment Rates

Rates per Thousand<sup>42</sup>

First Quarter Fiscal Year 1992 October-December 1991					
	Armywide	CONUS	Europe	Pacific	Other
GCM	0.38 (1.53)	0.40 (1.61)	0.43 (1.71)	0.34 (1.35)	0.35 (1.40)
BCDSPCM	0.19 (0.77)	0.21 (0.85)	0.12 (0.47)	0.34 (1.35)	0.35 (1.40)
SPCM	0.03 (0.14)	0.03 (0.12)	0.05 (0.18)	0.04 (0.15)	0.35 (1.40)
SCM	0.31 (1.25)	0.22 (0.89)	0.45 (1.79)	0.92 (3.68)	0.17 (0.70)
NJP	18.54 (74.14)	19.15 (76.61)	19.62 (78.49)	21.45 (85.81)	30.61 (122.42)

<sup>35</sup>*Id.*

<sup>36</sup>*Id.*

<sup>37</sup>*Id.* at 92-93.

<sup>38</sup>*Id.* at 93.

<sup>39</sup>*Id.*; see also *Morris v. Schoonfield*, 399 U.S. 508, 509 (1970) (noting that the Constitution prohibits conversion of a fine to a jail term when the individual is indigent and cannot pay the fine in full); Sentencing Guidelines for United States Courts § SE4.2(g) (1989) [hereinafter Sentencing Guidelines] (if the payment of a fine in a lump sum would have an unduly severe impact on the defendant or on his or her dependents, the court should establish an installment schedule for the payment of the fine); Standards for Criminal Justice § 18-7.4 commentary (Am. Bar Ass'n 2d ed. 1986) (sentence authorities should use the flexibility accorded them to accommodate changes in the financial conditions and obligations of offenders); Model Penal Code § 7.02(4) (Proposed Official Draft 1962) (in determining the amount and method of payment of a fine, the court shall take into account the financial resources of the defendant and the nature of the burden that its payment will impose).

<sup>40</sup>*Tuggle*, 34 M.J. at 93 (citing 18 U.S.C. §§ 3572-3573; Sentencing Guidelines, *supra* note 39, § SE1.2(g)).

<sup>41</sup>See UCMJ.

<sup>42</sup>These figures are based on average Army personnel strength of 696,853. The figures in parentheses are the annualized rates per thousand.

## Contract Appeals Division Note

### A Contract Claim Certification Primer

#### Introduction

The relationship between a contractor and a government contracting officer normally should not be adversarial. The Federal Acquisition Regulation (FAR) contemplates that the parties will be able to work out their differences amicably.<sup>43</sup> Nevertheless, when a dispute arises that the parties cannot resolve, the Contract Disputes Act of 1978<sup>44</sup> (CDA) provides a statutory vehicle for the resolution of that dispute.

The contractor must begin the dispute resolution process by submitting a "claim."<sup>45</sup> To do so, the contractor must provide the contracting officer with written notice of the basis and the amount of the claim and must produce sufficient evidence to substantiate the claim.<sup>46</sup> If the claim exceeds \$50,000, the contractor also must certify the claim.<sup>47</sup> This certification requirement has produced extensive litigation. It can create many hazards for unwary practitioners.

Because claim certification has become such a contentious issue, judge advocates involved in the claims process should learn exactly what must be said and who must say it. This note outlines those requirements, explaining each of the requirements set out in the CDA and the FAR in light of the most recent decisions of the courts and the boards of contract appeals.

#### Required Certification Language

Section 605(c)(1) of the CDA provides,

For claims of more than \$50,000, the contractor shall certify that the claim is made in

good faith, that the supporting data are accurate and complete to the best of his [or her] knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable.<sup>48</sup>

Exact compliance with the terms of the statute is essential.<sup>49</sup> Although these requirements are fairly straightforward, the failure of many contractors to follow them to the letter has resulted in a considerable amount of litigation.

That the subject matter jurisdictions of the boards of contract appeals and the Claims Court are predicated in part upon the CDA's certification requirement now is well established.<sup>50</sup> That a claim certification either must quote the CDA's statutory language verbatim or must assert its substantial equivalent also is well settled.<sup>51</sup> The boards generally apply this requirement strictly, showing great reluctance to approve certifications lacking any part of the CDA's language. As the Armed Services Board of Contract Appeals (ASBCA) recently stated in *Fischbach & Moore International Corp.*, "When a contractor deviates from that [certification] language . . . [we not only must consider] our duty to see that [the] formal requirements of the statute are met, . . . [but also must] look to see whether the language used had the effect of diluting the strength of the certification."<sup>52</sup>

The boards frequently have invalidated certifications in which contractors omitted key words from the statutory language and have dismissed the underlying claims for lack of jurisdiction.<sup>53</sup> Their decisions suggest that a contract attorney should adopt a two-prong approach in considering certification issues. First, the attorney should determine whether the certification quotes the exact language of the statute. If the contractor has left out words that could affect the meaning of the certification, the attorney should decide whether this deviation from the statutory norm dilutes the strength of the

<sup>43</sup>Fed. Acquisition Reg. 33.204 (1 Apr. 1984) [hereinafter FAR].

<sup>44</sup>41 U.S.C. § 601-613 (1988).

<sup>45</sup>*Id.* § 605(a).

<sup>46</sup>*Holk Dev., Inc.*, ASBCA Nos. 40,579 & 40,605, 90-3 BCA ¶ 23,086.

<sup>47</sup>41 U.S.C. § 605(c)(1) (1988). Provisions of 10 U.S.C. § 2410 set out a separate requirement for certification of contract claims and requests for equitable adjustments that exceed \$100,000. A proposed change to the FAR also would require a contractor to certify any claim that is to be resolved using alternative dispute resolution, regardless of the amount. See 56 Fed. Reg. 67,416 (1991). These requirements are not addressed in this note.

<sup>48</sup>41 U.S.C. § 605(c)(1) (1988).

<sup>49</sup>A contracting officer's decision on an improperly certified claim is void. See *C.F. Elecs.*, ASBCA No. 41,786, 92-1 BCA ¶ 24,488; see also FAR 33.207 (providing that a demand in excess of \$50,000 must be certified in accordance with the CDA and the FAR before it may be treated as a claim).

<sup>50</sup>*W.M. Schlosser Co. v. United States*, 705 F.2d 1336 (Fed. Cir. 1983).

<sup>51</sup>*Bontke Bros. Constr. Co.*, ASBCA No. 39,437 (19 Nov. 1991) (citing *E.H. Eng'g*, ASBCA No. 38,783, 90-1 BCA ¶ 22,344).

<sup>52</sup>ASBCA No. 42,170, 92-1 BCA ¶ 24,511.

<sup>53</sup>*Allied Painting & Decorating Co.*, ASBCA No. 42,496, 91-3 BCA ¶ 24,076; *Leadermar, Inc.*, ASBCA No. 42,409 (12 July 1991); *Kohol Sys., Inc.*, ASBCA No. 40,710, 91-1 BCA ¶ 23,291; *Cox & Palmer Constr. Corp.*, ASBCA No. 37,328, 91-1 BCA ¶ 23,652; see also *Joseph Saif, Inc.*, ASBCA No. 41,456, 92-1 BCA ¶ 24,407 ("the amount claimed represents the contract adjustment for which the Government believes it is liable" held defective); *Fischbach & Moore Int'l Corp.*, ASBCA No. 42,170, 92-1 BCA ¶ 24,511 ("data are accurate and complete to the best of the contractor's understanding and belief" held defective); *Whittaker Corp., Bernite Div.*, ASBCA No. 39,126, 92-1 BCA ¶ 24,376 ("the supporting data(s) are accurate and complete" held defective); *Henry Angelo & Co.*, ASBCA No. 41,827, 91-3 BCA ¶ 24,120 (omission of the word "belief" held defective); *B&M Constr., Inc.*, ASBCA No. 91-132-1, 91-2 BCA ¶ 23,670 ("the claim accurately reflects the amount of damages that the contractor incurred" held defective).

certification.<sup>54</sup> If it does, the certification is jurisdictionally defective. When the CDA requires a contractor to certify a claim, the contracting officer cannot render a final decision unless the claim is certified properly.<sup>55</sup> Accordingly, an attorney should advise the contracting officer to return an improperly certified claim to the contractor with an explanation that the required certification was not supplied.<sup>56</sup>

The Court of Appeals for the Federal Circuit has been more liberal than the boards in determining whether the language a contractor has used in a certification is the "substantial equivalent" of the language in the CDA. The court's 1984 decision in *United States v. General Electric Corp.*<sup>57</sup> exemplifies its approach to the subject. Appealing a decision of the ASBCA, the Government argued that General Electric's certification was void because General Electric had failed to quote the certification language verbatim and had failed to state the amount of its claim.<sup>58</sup> The court rejected the Government's contentions, remarking,

The November 13, 1979 statement began with the words "Claim for Payments . . ."; [it] listed the contracts for which . . . costs were sought; [it] made reference to other correspondence; [it] enclosed a statement of the overceiling costs for 1978 and 1979 [that were] allocable to the subject contracts; [it stated] . . . that, pursuant to the Contract Disputes Act of 1978, [the] contractor requested a final decision from the contracting officer regarding the claim; that the cost comprised . . . overceiling . . . costs . . . [that were described in an enclosed] . . . summary of the costs which provided for an equitable adjustment by reason of the [Department of Defense] policy change; [and] that . . . [the contractor] believed it was entitled to the adjustment; [and] it certified [that] the claim was made in good faith and the supporting data was accurate and complete to best of

[the] signer's knowledge and belief. *This document, with attachments, contain[ed] the information and statements required by the statute and [was] in substantial compliance therewith.* The contracting officer and [the] ASBCA thus acquired jurisdiction.<sup>59</sup>

Although this language does not define "substantial equivalent" precisely, it indicates that the Federal Circuit will look beyond the four corners of a claim letter to determine whether a contractor has met certification requirements and it demonstrates the court's expansive interpretation of the CDA.

### Who Must Certify?

As noted above, the CDA requires "the contractor" to certify a claim exceeding \$50,000. Although the CDA defines "contractor" as "a party to a Government contract other than the Government,"<sup>60</sup> it does not further assist contract law practitioners in determining who must certify claims. Additional guidance, however, may be found in the FAR. Section 33.207(c) of the FAR provides,

(1) If the contractor is an individual, the certification shall be executed by the individual.

(2) If the contractor is not an individual, the certification shall be executed by—

(i) A senior company official in charge at the contractor's plant or location involved; or

(ii) An officer or general partner of the contractor having overall responsibility for the conduct of the contractor's affairs.

One must pay close attention to the regulation if the contractor is not an individual. The qualifications for the two

<sup>54</sup>In *Bontke Brothers Construction Co.*, the defective certification read, "BONTKE BROTHERS CONSTRUCTION COMPANY states that this claim is made in good faith and is supported by data to indicate that the claim is accurate and complete to the best of the undersigned's knowledge and belief." See *Bontke Bros. Constr. Co.*, ASBCA No. 39,437 (19 Nov. 1991). The ASBCA found that "it is not inconceivable that a monetary claim could be characterized as 'accurate and complete,' i.e., mathematically correct and/or internally consistent, yet be supported by incomplete and inaccurate data." *Id.* That the government had provided the appellant with the certification language that the ASBCA later found to be defective did not prevent the ASBCA from dismissing the appellant's case. See *id.*

<sup>55</sup>FAR 33.201; see also *Essex Electro Eng'rs, Inc. v. United States*, 702 F.2d 998 (Fed. Cir. 1983); *Skelly & Loy v. United States*, 685 F.2d 414 (Ct. Cl. 1982); *Paul E. Lehman, Inc. v. United States*, 673 F.2d 352 (Ct. Cl. 1982).

<sup>56</sup>Whether the contracting officer should inform the contractor of the proper language to use and the proper way to certify a claim should be a matter of local policy. See *General Elec. Corp.*, ASBCA No. 24,913, 83-1 BCA ¶ 16,130, *aff'd*, 727 F.2d 1567 (Fed. Cir. 1984).

<sup>57</sup>727 F.2d 1567 (Fed. Cir. 1984).

<sup>58</sup>Because the certification was not at issue before the ASBCA, the Board did not quote the actual certification language used. See *General Elec. Corp.*, ASBCA No. 24,913, 83-1 BCA ¶ 16,130.

<sup>59</sup>*General Elec. Corp.*, 727 F.2d at 1769 (emphasis added).

<sup>60</sup>41 U.S.C. § 601(4) (1988).

classes of authorized certification officials are disjunctive; moreover, each contains more than one essential component. To understand these components, one must examine the underlying bases of the FAR requirements.

The FAR's implementation of the statute derives from guidance provided by the Office of Federal Procurement Policy (OFPP).<sup>61</sup> The OFPP sought to ensure that the procuring agencies adopted uniform and consistent language when they promulgated regulations to implement the CDA. The OFPP also meant to impress upon each nonindividual contractor the importance of filing legitimate claims by requiring high-level officials within the contractor's organization to examine the basis of each claim. Finally, the OFPP sought to promote fair, expedient claims resolutions by stating precisely who could certify a claim. Ironically, its attempt to prevent protracted litigation of certification issues has had the opposite effect.

### Who REALLY Must Certify?

#### Certification by

#### A Senior Company Official

To satisfy FAR 33.207(c)(2)(i), a senior company official in charge at the plant or location involved must certify the claim. This official, however, need not be the senior company official; he or she only must be one of the senior company officials.<sup>62</sup> Who is a "senior company official"? The Court of Appeals for the Federal Circuit provided explicit guidance on this issue in 1991, when it decided *Grumman Aerospace Corp.*<sup>63</sup>

In *Grumman Aerospace*, the court declared that a senior company official must have primary responsibility for the execution of the contract and must be present physically at the site of the primary contract activity.<sup>64</sup> Subsequent cases in

which the boards of contract appeals interpreted *Grumman Aerospace* have shed further light on both aspects of this requirement.

The ASBCA has held that "primary responsibility for the execution of the contract" means responsibility for contract performance, not merely contract signatory authority.<sup>65</sup> The ASBCA also decided that an individual who was an officer and director of a corporation automatically qualified as a senior company official.<sup>66</sup> Most decisions on this issue, however, have involved certifications by project managers or by vice presidents who were responsible for discrete corporate functions, such as financial affairs.

In general, the boards have applied the FAR criteria on a case-by-case basis, placing considerable emphasis on the certifying individual's responsibilities within the contractor's organization.<sup>67</sup> Consistent with this approach, one should look at the individual's relative rank within the corporation and at his or her managerial responsibilities.<sup>68</sup> The nature and extent of the official's responsibilities, as well as the size of the operation over which that person exercises authority,<sup>69</sup> are critical factors in determining whether a person is a "senior company official." A project manager may qualify as a senior company official if his or her project represents a significant portion of the company's business.<sup>70</sup> Likewise, a project manager who supervises twenty different projects and has general supervisory powers, full authority to bind the company without prior approval, and unlimited authority to prepare contract claims probably will qualify.<sup>71</sup>

Having decided that an individual is a senior company official, one must determine whether the individual is primarily responsible for the execution of the contract—that is, whether the person is "in charge" at the plant or the site of the primary contract activity.<sup>72</sup> Only one person can be in charge at a particular location.<sup>73</sup> Merely being the most knowledgeable person at the site does not endow an individual with the requisite authority.<sup>74</sup> Once again, the boards of

<sup>60</sup>41 U.S.C. § 601(4) (1988).

<sup>61</sup>Office of Fed. Procurement Policy, Policy Letter 80-3, 45 Fed. Reg. 30,135 (1980).

<sup>62</sup>*Emerson Elec. Co.*, ASBCA No. 37,352, 91-1 BCA ¶ 23,581.

<sup>63</sup>927 F.2d 575 (Fed. Cir. 1991).

<sup>64</sup>*Id.* at 580.

<sup>65</sup>*Algernon Blair, Inc.*, ASBCA No. 40,754, 91-2 BCA ¶ 23,920.

<sup>66</sup>*Emerson Elec. Co.*, ASBCA No. 37,352, 91-1 BCA ¶ 23,581. A corporate officer also might qualify under the FAR's second alternative. See FAR 33.207(c)(2)(ii).

<sup>67</sup>*Universal Canvas, Inc.*, ASBCA No. 36,141, 91-3 BCA ¶ 24,179.

<sup>68</sup>*Hartford Accident and Indem. Co.*, ASBCA No. 38,023, 91-3 BCA ¶ 24,046.

<sup>69</sup>*J.A. Jones Constr. Co.*, ASBCA No. 38,827 (9 Sept. 1991).

<sup>70</sup>*Id.*; *Holmes & Narver Servs., Inc. & Morrison-Knudsen Co., Joint Venture*, ASBCA No. 40,111, 91-3 BCA ¶ 24,235; *Clement-Murri Cos.*, ASBCA No. 38,170, 91-3 BCA ¶ 24,244.

<sup>71</sup>*Manning Elec. & Repair Co. v. United States*, 22 Cl. Ct. 240 (1991).

<sup>72</sup>*Grumman Aerospace Corp.*, 927 F.2d at 580.

<sup>73</sup>*Triple "A" South*, ASBCA No. 35,824, 91-3 BCA ¶ 24,192.

<sup>74</sup>*Kaco Contracting Co.*, ASBCA No. 43,066 (15 Nov. 1991); *Danac, Inc.*, ASBCA No. 30,609 (5 Nov. 1991); *Lake Shore, Inc.*, ASBCA No. 42,578 (30 Sept. 1991).

contract appeals have focused upon the nature of an individual's responsibilities when asked to determine "who is in charge here." A person who bears exclusive responsibility for a contractor's only money-making function has been found to be in charge.<sup>75</sup> Similarly, a person who was primarily responsible for the performance of work under a contract was in charge.<sup>76</sup> In one decision, the active involvement of the certifier's immediate superior in operations at the same location precluded a finding that the certifier was in charge;<sup>77</sup> however, in another case, the ASBCA held that the involvement of a superior who was present primarily to ensure oversight by the contractor's board of directors was not enough to disqualify the certifier.<sup>78</sup> The nature and the extent of the certifier's responsibilities, the active involvement of the certifier's superior in the contract performance, and the limits on the certifier's authority all indicate who actually is in charge.

Once one determines that an individual is a senior company official in charge, one must determine whether that person met those criteria at the site of the *primary* contract activity. Although this requirement has not generated a great deal of controversy, several board decisions have focused on the issue. In two similar cases, the ASBCA considered claims arising from construction contracts. In each case, the ASBCA construed the phrase "primary contract activity" to mean activity at the site of contract performance, which it deemed to be the place where the contractor was erecting the building.<sup>79</sup> Because the claims certifications were executed by individuals working at the contractors' home offices—not by company officials at the construction sites—the ASBCA found that the claims were not certified properly.

In *TRW, Inc.*,<sup>80</sup> the ASBCA interpreted this phrase in a different context. The contractor filed a claim that derived from a contract to develop and install computer hardware and software for Army units in Korea. The claim was certified by an individual located in the contractor's Fairfax, Virginia, office. The Government argued that the location of the primary contract activity was Korea because the hardware and

software systems ultimately were to be installed there. The ASBCA disagreed. Analyzing the hours the contractor would expend and the costs it would incur at each location, the ASBCA concluded that the location of primary contract activity was Fairfax, Virginia. In particular, it noted that the contractor was developing the software and procuring the hardware components in Fairfax.

In *TRW, Inc.*, the ASBCA did not review expressly the specific criteria upon which it had relied in the construction cases. Nevertheless, it followed those decisions by equating the "location involved" with the site of performance. Furthermore, the ASBCA clarified that the location of primary contract activity may be determined from the hours a contractor expends, and the costs it incurs, at a particular location.

#### Certification by An Officer or General Partner

Under FAR 33.207(c)(2)(i), an officer or a general partner who has overall responsibility for the conduct of the contractor's affairs may certify a claim.<sup>81</sup> The identification of appropriate officials under this provision has not been difficult. Case law reveals that a chief executive officer, or an official of equivalent standing, normally qualifies as an officer of the corporation.<sup>82</sup> A board actually may conclude from a person's title that the person meets this criterion—or, at least, it may require the Government to prove that the person lacks the authority contemplated in the regulation.<sup>83</sup>

On the other hand, the requirement that an officer or general partner must have "overall responsibility for the conduct of the contractor's affairs" has produced a significant amount of litigation. *Grumman Aerospace* does little to clarify this requirement; however, the ASBCA has developed guidance on the issue in a number of recent decisions.

1991); McDonnell Douglas Missile Sys. Co., ASBCA No. 37,712, 91-3 BCA ¶ 24,342.

<sup>75</sup>Clement-Miari Cos., ASBCA No. 38,170, 91-3 BCA ¶ 24,244. This determination is easy when the certifying official is responsible for all of the revenues of the company. What is the answer, however, when the individual is not responsible for *all* of the revenues? Compare *M.A. Mortensen*, ASBCA No. 39,978, 91-1 BCA ¶ 23,558 (project manager qualified as proper certifying official when the project for which he was responsible generated 36% of the contractor's revenues) with *J.A. Jones Constr. Co.*, ASBCA No. 38,827 (9 Sept. 1991) (finding that an official responsible for a project generating 15% of appellant's revenues lacked certification authority under the CDA).

<sup>76</sup>*Motorola, Inc.*, ASBCA No. 41,528 (7 Aug. 1991).

<sup>77</sup>*Northwest Marine*, ASBCA No. 41,702, 91-2 BCA ¶ 24,020.

<sup>78</sup>*M.A. Mortensen*, ASBCA No. 39,978, 91-1 BCA ¶ 23,558.

<sup>79</sup>*Jaycor*, ASBCA No. 40,911, 91-3 BCA ¶ 24,082; *R.J. Lanthier Co.*, ASBCA No. 41,350, 91-2 BCA ¶ 23,917.

<sup>80</sup>ASBCA No. 42,191 (15 Nov. 1991).

<sup>81</sup>See also *Grumman Aerospace Corp.*, 927 F.2d at 580.

<sup>82</sup>*Id.*; accord *Robert R. Marquis, Inc.*, ASBCA No. 38,438, 91-3 BCA ¶ 24,240.

<sup>83</sup>See *United States v. Newport News Shipbld'g & Dry Dock Co.*, 933 F.2d 996, 999 n.3 (Fed. Cir. 1991) ("[O]ur precedent suggests that an Executive Vice President, who by title, clearly is a corporate officer with overall responsibilities, may certify a claim"); accord *Universal Canvas, Inc.* ASBCA No. 36,141, 91-3

The size of the company and the position the person occupies in the corporate structure are significant factors.<sup>84</sup> For instance, the ASBCA has held that a vice president in the third tier of the contractor's management echelon lacked the requisite quality of overall responsibility.<sup>85</sup> On the other hand, a vice president who worked for a small company and reported directly to the president was found to exercise the necessary degree of authority.<sup>86</sup> Likewise, the secretary-treasurer and co-owner of a family business that lacked "an elaborate corporate structure" was found to possess the required authority.

What conclusions can be drawn from this review? First, the contractor bears the burden of proving that the certifying individual had the requisite "overall responsibility." If the contractor can show that this person is a high-ranking corporate officer, the burden of proof shifts to the Government to establish that the individual is not qualified to certify the claim. Presidents, chief executive officers, and executive vice presidents definitely meet the certification requirements. Any other corporate official, however, is suspect and a tribunal will inquire into the official's specific corporate responsibilities before deciding whether he or she lawfully could certify a claim.

**What the Future Holds**—The OFPP has issued a draft amendment to Policy Letter 80-3, the document in which the OFPP first established the certification requirement.

In an effort to reduce further litigation, the OFPP has issued a draft amendment to Policy Letter 80-3, the document in which the OFPP first established the certification requirement. Under the proposed change, when a contractor is not an individual, the certification must be executed by: (1) a general partner; (2) a corporate officer; or (3) any employee, other than a general partner or an officer, who is authorized, without the power of redelegation, to bind the contractor in certifying CDA claims. An employee's authorization to certify claims must in writing and must identify the employee by name or by position. Only the contractor's board of directors or one of its corporate officers may delegate certification authority to an employee.

By allowing a contractor to delegate claims certification authority to its employees, the draft amendment appears to eviscerate the certification requirement. Although the amendment's written delegation requirement might cause senior officials to scrutinize a delegate's ability to review a claim and to attest to its validity, the amendment would not require them

to involve themselves directly in the claims process. Few, if any, corporate officials ever would see or examine a claim, much less consider its validity.

The original requirement, however, compels the examination of claims by senior officials primarily to deter the presentation of fraudulent claims. The amendment would not detract from this purpose. Under its provisions, a corporate contractor would remain liable as a principal if its duly authorized employee certified a fraudulent claim.<sup>87</sup> Moreover, the draft amendment would not necessarily remove claims from the consideration of a contractor's upper management. By prohibiting redelegation, the amendment effectively would impose a limit on how low a contractor's certification authority could go.<sup>88</sup> In any event, the important public policy underlying the certification requirement would remain intact, whether a partner, an officer, or an authorized employee certified the claim.

The proposed amendment would eliminate any requirement that a corporate official or general partner have overall responsibility for a contractor's affairs or be present or in charge at the location of the contractor's primary activity under the contract. The new policy would permit a contractor to designate a person who could act in a manner consistent with sound management practice. Moreover, it would obviate the difficult and elusive inquiry into the nature of a contractor's "primary contract activity."

Overall, the proposed amendment would promote an avowed goal of the CDA by allowing fast, efficient resolution of contract disputes. As amended, the FAR would permit the parties to focus on the merits of a claim, rather than on who signed the certification.

**Conclusion**—The FAR's certification requirement has been a source of confusion and litigation. The proposed amendment would eliminate much of the litigation over who must certify claims and will allow the parties to get on with more substantive issues. Major Miller.

<sup>84</sup>Universal Canvas, Inc. ASBCA No. 36,141, 91-3 BCA ¶ 24,179.

<sup>85</sup>Kaco Contracting Co., ASBCA No. 43,066 (15 Nov. 1991); Aerojet Ordnance Co., ASBCA No. 35,936, 91-3 BCA ¶ 24,191; see also Newport News Shipbuilding & Dry Dock Co., ASBCA No. 33,244, 91-2 BCA ¶ 23,865 (holding that an officer in the fourth level of management did not meet the FAR certification requirement), *aff'd on recons.*, 91-3 BCA ¶ 24,132, *aff'd*, 933 F.2d 996 (Fed. Cir. 1991).

<sup>86</sup>Universal Canvas, Inc., ASBCA No. 36,141, 91-3 BCA ¶ 24,179.

<sup>87</sup>See, e.g., Restatement (Second) of Agency § 257 (1957).

<sup>88</sup>Presumably, if an employee to whom the contractor originally delegates certification authority attempted to delegate that authority to another person, any certification by the second-level delegate would be invalid.

# TJAGSA Practice Notes

Instructors, The Judge Advocate General's School

## Criminal Law Notes

### Can the Government Ever Satisfy the Clear and Convincing Evidence Standard Under Military Rule of Evidence 313(b)?

A weapons and contraband inspection is lawful *only* if it has a nonprosecutorial or administrative purpose. Consequently, a commander who lacks probable cause to authorize a search for illegal drugs cannot use an inspection as a subterfuge to search for those drugs. Evidence seized in the course of this prosecutorial "inspection" would be inadmissible at trial.

Military Rule of Evidence (MRE) 313 governs the admissibility of evidence obtained in an inspection. To introduce contraband under this rule, a trial counsel normally must show only by a preponderance of the evidence that the inspection had an administrative purpose. Military Rule of Evidence 313(b), however, provides that the Government must prove by clear and convincing evidence that an inspection's purpose was administrative if "a purpose" of an inspection was "to locate weapons or contraband" and the defense shows that the inspection: (1) was directed immediately after the report of a crime and was not scheduled previously; (2) targeted specific persons for inspection; or (3) subjected the persons being examined to intrusions that were "substantially different" from those that other persons experienced during the inspection.<sup>1</sup>

Given the difficulty of meeting this enhanced burden of proof, most practitioners have concluded that evidence essentially is inadmissible if it was seized during an inspection that triggers the "subterfuge rule." Reported appellate decisions support this view. In *United States v. Thatcher*,<sup>2</sup> for instance, the Court of Military Appeals held that the Government failed to show by clear and convincing evidence that an intrusion into a barracks room was an inspection, rather than an illegal search. The accused, a Marine with a reputation for being "caught but not charged with taking things,"<sup>3</sup> was the

primary suspect in a larceny.<sup>4</sup> Members of his chain of command who were investigating the theft bypassed the other rooms in the barracks to search the accused's room first. The court concluded that the evidence obtained in this search—the stolen property—was seized illegally and admitted improperly. Similarly, in *United States v. Parker*,<sup>5</sup> the Air Force Court of Military Review ruled that the subterfuge rule was triggered when a commander ordered a unit urinalysis following the discovery of a marijuana cigarette in a parking lot used by unit personnel. Significantly, the commander testified that he "definitely" ordered the urinalysis "with an eye toward some type of disciplinary action."<sup>6</sup>

Unfortunately, *Thatcher*, *Parker*, and other cases involving MRE 313(b) fail to tell practitioners what command rationale *would* satisfy the clear and convincing evidence standard. For example, if a commander found a vial of cocaine in a unit area, could she order a urinalysis for all her soldiers because she fears she may have cocaine-using soldiers in the unit? If a police officer told a commander of a rumor that an unknown soldier in the commander's unit has been selling drugs to other soldiers, could the commander immediately inspect his unit to see if it is "drug-free"? Are these examinations prosecutorial or administrative? If they are administrative and the subterfuge rule is triggered, what factors will satisfy the clear and convincing evidence standard? This practice note offers some answers to these questions by looking at the decisions of the Air Force Court of Military Review and the Court of Military Appeals in *United States v. Alexander*.<sup>7</sup>

Sergeant Alexander lived and worked with fifty other service members at a remote Air Force site in South Dakota. On 18 May 1989, the local sheriff told the site commander "that several unnamed military members" had bought illegal drugs. Deciding that he lacked probable cause to authorize a search, the commander ordered an inspection by a military working-dog team. The dogs and their handlers arrived on 22 May. During the "walk-through inspection" of a common

<sup>1</sup> Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 313(b) [hereinafter Mil. R. Evid.].

<sup>2</sup> 28 M.J. 20 (C.M.A. 1989), reversing 21 M.J. 909 (N.M.C.M.R. 1986).

<sup>3</sup> *Id.* at 21.

<sup>4</sup> *Id.*

<sup>5</sup> 27 M.J. 522 (A.F.C.M.R. 1988).

<sup>6</sup> *Id.* at 527.

<sup>7</sup> 32 M.J. 664 (A.F.C.M.R. 1991), *aff'd on other grounds*, 34 M.J. 121 (C.M.A. 1992).

area outside the accused's room, a dog "alerted" on the room. The commander was notified. He authorized a search of the room. There, law enforcement agents found a straw tainted with traces of cocaine and methamphetamines. The accused then consented to a search of his car; a quantity of marijuana was discovered in the vehicle. Alexander also consented to provide a urine sample, which ultimately tested positive for marijuana.

At his court-martial, the accused moved to suppress "all evidence seized in the search of [his] room as well as all derivative evidence."<sup>8</sup> The trial judge denied the motion, ruling that all the evidence was admissible "as part of a legitimate morale, welfare and readiness inspection."<sup>9</sup> The judge did not apply the clear and convincing evidence standard in making his ruling. Moreover, the trial counsel did not argue that the commander had had probable cause to authorize a search of Alexander's room and the trial judge evidently did not consider probable cause as an alternative basis for admitting the evidence.

On appeal, the accused argued that the trial "judge [had] erred in failing to apply the 'clear and convincing evidence' standard."<sup>10</sup> The Air Force Court of Military Review agreed. Invoking its fact-finding power under article 66(c) of the Uniform Code of Military Justice<sup>11</sup> (UCMJ), the court applied this standard to determine whether the inspection was valid. It concluded that "the primary purpose of the examination . . . was a valid [administrative] inspection."<sup>12</sup>

The Air Force court's opinion is important because it identifies the factors inherent in the inspection of Alexander's quarters that enabled the Government to meet the clear and convincing evidence standard. The court noted that the "commander testified that he [had] directed the inspection to: (1) insure military fitness; (2) establish unit readiness and security; (3) protect the image of the military in the local community; and (4) determine if a drug problem existed."<sup>13</sup> These purposes, the court explained, "were legitimate grounds on which to conduct an inspection, and they were not superseded by the recent report of criminal activity that also provided a reason for the examination."<sup>14</sup>

In reaching this decision, the court emphasized that MRE 313(b) is not "'intended to fashion a rule that . . . [would prevent] a legitimate health and welfare inspection' simply because there also 'exists some degree of command suspicion concerning the activities of any of its members.'"<sup>15</sup> Accordingly, Alexander supports the argument that evidence found during a contraband inspection is admissible even if the commander ordered the examination immediately after the report of a crime. Alexander also illustrates that a commander's testimony can satisfy the clear and convincing evidence standard even when that testimony is extraordinarily general and conclusory.

The Court of Military Appeals granted review to determine whether the inspection was lawful, but it ultimately declined to decide the case on that basis. Instead, Chief Judge Sullivan and Senior Judge Everett found that the evidence was admissible as the product of a search supported by probable cause.<sup>16</sup> This result is unfortunate. A decision on the granted issue would have provided practitioners with unequivocal guidance about MRE 313(b) and the "clear and convincing evidence" standard. Nevertheless, the Court of Military Appeals' decision in Alexander is worth examining because Judge Cox *did* decide the granted issue in his concurring opinion. Although this opinion is not binding precedent, it is remarkable in its approach.

Judge Cox completely ignored MRE 313(b) and the clear and convincing evidence standard. He did not even mention the subterfuge rule. To Judge Cox, the only essential question was whether the commander had ordered the inspection "to evaluate the fighting effectiveness or preparedness of a unit, or an individual."<sup>17</sup> If this was the purpose of the examination, then it was a valid inspection aimed at promoting "mission preparedness" and any contraband seized during the inspection was admissible. In Judge Cox's words:

[A]ny threat to combat effectiveness or mission preparedness provides a legitimate basis for inspection. . . . [Furthermore,] any time a commander's probing actions relate directly to the ability of an individual or

<sup>8</sup>Id. at 666.

<sup>9</sup>Id.

<sup>10</sup>Id.

<sup>11</sup>Uniform Code of Military Justice art. 66(c), 10 U.S.C. § 866(c) (1988) [hereinafter UCMJ].

<sup>12</sup>Alexander, 32 M.J. at 666.

<sup>13</sup>Id.

<sup>14</sup>Id.

<sup>15</sup>Id. (citing United States v. Shepherd, 24 M.J. 596, 600 (A.F.C.M.R.), petition for review denied, 25 M.J. 238 (C.M.A. 1987)) (emphasis added).

<sup>16</sup>See United States v. Alexander, 34 M.J. 121 (C.M.A. 1992).

<sup>17</sup>34 M.J. at 127 (Cox, J., concurring).

organization to perform the military mission . . . we have a *presumptively* valid military inspection. It does not matter whether the commander has reason to suspect that the individual or unit will fail the inspection.<sup>18</sup>

Judge Cox also asserted that a commander who learns that a soldier is a drug user should be able to order a urinalysis "to protect the safety and readiness of his personnel."<sup>19</sup> This urinalysis, Judge Cox stated, is a legitimate inspection. "What distinguishes an inspection from a search for the fruits or evidence of crime is the nexus to the military mission." As long as the action relates to mission security, it should be considered an inspection.<sup>20</sup>

Applying this rationale to the facts in *Alexander*, Judge Cox concluded that the commander ordered a proper administrative inspection. The "presence of" drugs in a unit "is utterly inimical to" mission accomplishment. "Ridding the installation of drugs was *directly* tied to mission performance";<sup>21</sup> therefore, the inspection was lawful.

What happened to the subterfuge rule and the clear and convincing evidence standard? Judge Cox evidently found them unnecessary to an analysis of an inspection's lawfulness. This approach may reflect Judge Cox's tendency to focus on the reasonableness clause of the Fourth Amendment<sup>22</sup> when deciding search and seizure issues.<sup>23</sup>

Trial counsel should read the Air Force court's opinion in *Alexander* carefully. It gives excellent guidance on how to

<sup>18</sup>*Id.* (emphasis added).

<sup>19</sup>*Id.* at 128.

<sup>20</sup>*Id.*

<sup>21</sup>*Id.*

<sup>22</sup>U.S. Const., amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .").

<sup>23</sup>See, e.g., *United States v. Morris*, 28 M.J. 8 (C.M.A. 1989); *United States v. Moore*, 23 M.J. 295 (C.M.A. 1987).

<sup>24</sup>Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1001(b)(4) [hereinafter R.C.M.].

<sup>25</sup>Rule for Courts-Martial 1001(b)(4) provides, "The trial counsel may present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty. Except in capital cases a written or oral deposition taken in accordance with R.C.M. 702 is admissible in aggravation."

The discussion to R.C.M. 1001(b)(4) adds,

Evidence in aggravation may include evidence of financial, social, psychological, and medical impact on or cost to any person or entity who was the victim of an offense, committed by the accused and evidence of significant adverse impact on the mission, discipline, or efficiency of the command directly and immediately resulting from the accused's offense.

R.C.M. 1001(b)(4) discussion; see also R.C.M. 1004 (governing use of evidence of aggravating circumstances in capital cases).

<sup>26</sup>See *United States v. Mullens*, 29 M.J. 398 (C.M.A. 1990); *United States v. DeYoung*, 29 M.J. 78 (C.M.A. 1989); *United States v. Glazier*, 26 M.J. 268 (C.M.A. 1988); *United States v. Jackson*, 30 M.J. 565 (A.C.M.R. 1990); *United States v. Robinson*, 30 M.J. 548 (A.C.M.R. 1990); *United States v. Vargas*, 29 M.J. 968 (A.C.M.R. 1990).

<sup>27</sup>*Glazier*, 26 M.J. at 270.

<sup>28</sup>34 M.J. 183 (C.M.A. 1992).

argue for the admissibility of evidence obtained during an inspection that triggers the subterfuge rule. Judge Cox's concurring opinion in *Alexander* also may provide trial counsel with support. Defense counsel, on the other hand, should argue that the Court of Military Appeals' refusal to decide *Alexander* on the inspection issue diminished the authority of the Air Force court's decision. They also may counter the Government's reliance on Judge Cox's opinion by arguing that his analysis does not reflect a majority view of MRE 313(b). Major Borch.

### *United States v. Ross*— Sentencing an Accused for a Continuous Course of Uncharged Misconduct

Rule for Courts-Martial (R.C.M.) 1001(b)(4)<sup>24</sup> establishes parameters for the Government's introduction of sentencing aggravation evidence. The evidence must "directly relate to or result from" misconduct of which the accused has been found guilty.<sup>25</sup> The improper inclusion of irrelevant misconduct evidence in stipulations of fact has been a recurring appellate issue.<sup>26</sup> The Court of Military Appeals has held that even when the defense counsel and the accused have signed a stipulation of fact, at trial they may object to facts included in the stipulation and the military judge must rule on these objections.<sup>27</sup>

In *United States v. Ross*,<sup>28</sup> the accused pleaded guilty to three specifications of conspiring to alter a public record (specifically, an Army Service Vocational Aptitude Battery

test (ASVAB)),<sup>29</sup> one specification of wrongfully completing an ASVAB for another soldier,<sup>30</sup> and three specifications of accepting money to alter ASVABs.<sup>31</sup>

The accused entered into two stipulations of fact. First, he entered into a stipulation describing the circumstances surrounding the offenses to which he pleaded guilty. This stipulation was required by the accused's pretrial agreement. Second, the accused entered into a stipulation that included a copy of the accused's prior sworn statement to a military police investigator. In the statement, the accused admitted that he had altered "twenty or thirty" ASVABs and that he had told the soldiers who were taking the tests "to leave five or six questions blank" and that he would "fill in the right answers when [he] grade[d] the tests."<sup>32</sup>

During the providence inquiry, the accused objected to the judge's consideration of the reference in the second stipulation to his having altered twenty or thirty tests. Although the accused admitted that the statement was voluntary under MRE 305, he argued that the stipulation contained inadmissible evidence of "uncharged misconduct."<sup>33</sup> The trial counsel responded that evidence of the uncharged acts was admissible under MRE 404(b), then argued that, alternatively, the acts were proper evidence of aggravating circumstances under R.C.M. 1001(b)(4).

The military judge "admitted" the challenged stipulation before entering findings. The record, however, does not reveal whether the judge admitted the evidence for findings, for sentencing, or for both. Adding to this confusion, the judge not only allowed the trial counsel to argue the uncharged misconduct as a basis for a more severe sentence, but also allowed the defense counsel to assert in the defense counsel's sentencing argument that the uncharged misconduct should *not* be considered as R.C.M. 1001(b)(4) evidence. No

guidance appearing on the record suggests that the judge ever determined whether the uncharged misconduct was admissible under R.C.M. 1001(b)(4) as sentencing evidence.

The Court of Military Appeals granted review to determine "[w]hether the military judge erred by admitting and considering evidence of uncharged misconduct similar to the offenses of which accused was convicted."<sup>34</sup> The court began its opinion by noting that the military judge never specifically ruled on the challenged evidence's admissibility for sentencing. Consequently, the parties continued to litigate its admissibility throughout the trial—even debating this legal issue in their sentencing arguments. For purposes of appellate review, the Court of Military Appeals treated the evidence as having been admitted by the military judge for both findings and sentencing.<sup>35</sup>

The court then reviewed the propriety of admitting the uncharged misconduct for findings. It noted that this evidence was not needed to establish a provident guilty plea. Following two of its earlier decisions, *United States v. Wingart*<sup>36</sup> and *United States v. Holt*,<sup>37</sup> the court ruled that the uncharged misconduct evidence concerning additional test alterations was irrelevant to the findings.<sup>38</sup>

Addressing the admissibility of the uncharged misconduct evidence for sentencing, the court held that the continuous nature of the misconduct and its extensive impact on the military community were "aggravating circumstances" as contemplated by R.C.M. 1001(b)(4).<sup>39</sup> The court noted that the uncharged alterations occurred within the same time period, and at the same place, as the charged acts. Accordingly, evidence of the uncharged acts "clearly [was] relevant"<sup>40</sup> for sentencing and was not unduly prejudicial to the accused in a judge-alone trial, even though the judge admitted it prematurely on findings.<sup>41</sup>

<sup>29</sup>UCMJ art. 81.

<sup>30</sup>*Id.* art. 134.

<sup>31</sup>*Id.*

<sup>32</sup>*Ross*, 34 M.J. at 184.

<sup>33</sup>Notably, the defense counsel did not object under MRE 403 that the evidence should be excluded as prejudicial, confusing, or a waste of time.

<sup>34</sup>*Ross*, 34 M.J. at 184.

<sup>35</sup>*Id.* at 186. Defense counsel always should ensure that the military judge rules on objections. In *United States v. Ciulla*, 32 M.J. 186 (C.M.A.), *cert. denied*, 112 S. Ct. 172 (1991), the military judge never ruled on defense counsel's motion objecting to Government sentencing evidence. Observing that the defense counsel had an obligation to renew the objection, the court concluded that the defense counsel's failure to do so essentially waived this issue.

<sup>36</sup>27 M.J. 128, 135-36 (C.M.A. 1988).

<sup>37</sup>27 M.J. 57, 60 (C.M.A. 1988).

<sup>38</sup>*Ross*, 34 M.J. at 187.

<sup>39</sup>*Id.*

<sup>40</sup>*Id.*

<sup>41</sup>*Id.*

The Court of Military Appeals previously had confronted a similar issue in *United States v. Mullens*.<sup>42</sup> Mullens pleaded guilty to committing numerous acts of sexual misconduct with two children on divers occasions from 1983 to 1986. He objected, however, to portions of the stipulation referring to his uncharged sexual abuse of the same children at a different installation from 1979 to 1983. The accused based his objection on MRE 404(b). Considering this issue on appeal, the Court of Military Appeals stated that MRE 404(b) was not implicated. It observed that the Government had offered the admissions not to prove that the accused had committed the charged offenses, but to help the members to determine an appropriate sentence for the accused's crimes.<sup>43</sup> The court also noted that evidence of the uncharged misconduct was admissible to prove the accused had engaged in a continuous course of conduct, involving the same victims, similar crimes, and a similar situs within the military community.<sup>44</sup> These incidents, the court remarked, "demonstrate[d] not only the depth of [Mullens'] . . . sexual problems, but also the true impact of the charged offenses on . . . his family."<sup>45</sup>

Although *Ross* and *Mullens* focus on the admissibility of uncharged misconduct in stipulations of fact, they also outline the circumstances under which uncharged misconduct may be admitted in contested cases as evidence of a "continuing course of conduct." Read together, they suggest that a counsel's "continuous course of conduct" analysis should include the following questions:

- Are the crimes similar?
- Is the situs the same?
- Are the victims the same, or from the same class of people?
- What is the chronological relationship between the uncharged misconduct and the offense of which the accused has been found guilty?

<sup>42</sup>29 M.J. 398 (C.M.A. 1990).

<sup>43</sup>*Id.* at 400.

<sup>44</sup>*Id.*

<sup>45</sup>*Id.*

<sup>46</sup>See Mil. R. Evid. 403. In *Ross*, Judge Cox stressed the importance of MRE 403 to continuous course of conduct evidence. See *Ross*, 34 M.J. at 188. Judge Cox also urged military judges to ensure that members receive instructions limiting their uses of uncharged misconduct evidence. See *id.*

<sup>47</sup>*Holt*, 27 M.J. at 60.

<sup>48</sup>*Id.* (emphasis added).

<sup>49</sup>*Ross*, 34 M.J. at 186.

<sup>50</sup>30 M.J. 793 (N.M.C.M.R. 1990).

<sup>51</sup>*Id.* at 794.

<sup>52</sup>*Id.* at 794-95.

Counsel also should heed the warning that Judge Cox voiced in his concurring opinion in *Ross*—that is, they must take care to determine whether the prejudicial impact of the evidence substantially outweighs its probative value.<sup>46</sup> Finally, if the military judge admits the evidence and the accused is to be sentenced by members, the defense counsel should ask for a limiting instruction. Major Cuculic and Captain Miles, USMC.

#### More on *United States v. Ross*— Use of Information from the Providence Inquiry

In *United States v. Holt*<sup>47</sup> the Court of Military Appeals ruled that information that an accused reveals to the military judge during a providence inquiry may be introduced during sentencing. *Holt*, however, does not permit the unrestricted use of this information. The opinion states that, "if offered by the Government, this testimony should be admissible as an admission."<sup>48</sup> In *United States v. Ross*, Chief Judge Sullivan expounded on this requirement. Commenting on the use at trial of a stipulation in which the accused admitted to committing various acts of uncharged misconduct, the Chief Judge pointedly remarked that "no motion for admission of this evidence on sentencing was ever made by the prosecution in this guilty-plea case."<sup>49</sup> This comment implies that the Court of Military Appeals expects a trial counsel to offer formally any statement the accused makes at the providence inquiry that the prosecution wishes the sentencing authority to consider.

This proposition is consistent with the holding of the Navy-Marine Corps Court of Military Review in *United States v. Dukes*.<sup>50</sup> In *Dukes*, the Navy-Marine Corps court stated that *Holt* "permits the trial counsel to offer an accused's responses during the providency inquiry into evidence."<sup>51</sup> It added, however, that these "responses are not automatically in evidence, even in a trial by military judge alone, for an accused must be given not only notice of what matters are being considered against him [or her] but also an opportunity to object to admission of all or part of the providency inquiry."<sup>52</sup>

Chief Judge Sullivan's statement in *Ross* suggests that the Navy-Marine Corps court interpreted *Holt* correctly. Trial counsel and military judges would be wise to apply *Holt* in this manner. Similarly, a defense counsel should object to the Government's use of matters from the providence inquiry during sentencing if the trial counsel fails to provide the required offer and notice. Lieutenant Colonel Holland.

### Confusion About Malingering and Attempted Suicide: A Self-Inflicted Wound

Judge advocates who have served at installations at which basic training is conducted know that suicide gestures by soldiers in training are not uncommon. In troop units, intentional self-inflicted injuries occur more rarely, although some were reported during Operations Desert Shield and Desert Storm. When a serious instance of intentional self-inflicted injury arises, however, counsel quickly discover that the guidance contained in the *Manual for Courts-Martial* is incomplete and ambiguous.<sup>53</sup>

The *Manual* clearly defines the offense of malingering.<sup>54</sup> To be guilty of this offense, an accused must feign the inability to perform his or her duties, or must intentionally injure himself or herself to avoid work, duty, or service.<sup>55</sup> The offense of "self-injury without intent to avoid service" is listed in the *Manual* as a lesser-included offense of malingering and a violation of article 134 of the UCMJ.<sup>56</sup> This ancillary offense, however, is not identified specifically in the *Manual's* discussion of the general article,<sup>57</sup> nor is it listed in the *Manual's* maximum punishment chart.<sup>58</sup> Accordingly, the *Manual* offers no help to judge advocates seeking to identify the elements of the offense, to draft a specification alleging a violation, or to determine the authorized punishment for the crime.

<sup>53</sup> Manual for Courts-Martial, United States, 1984, Part IV, para. 40 [hereinafter MCM, 1984].

<sup>54</sup> UCMJ art. 115.

<sup>55</sup> MCM, 1984, Part IV, para. 40b.

<sup>56</sup> *Id.*, Part IV, para. 40d(1).

<sup>57</sup> *Id.*, Part IV, paras. 61-113.

<sup>58</sup> *Id.*, app. 12 (maximum punishment chart).

<sup>59</sup> 38 C.M.R. 393 (1968).

<sup>60</sup> MCM, 1984, analysis, app. 21, para. 40.

<sup>61</sup> Prosecution and confinement are included within the meaning of the phrase "work, duty, or service" under UCMJ article 115. *United States v. Johnson*, 26 M.J. 415, 418 (C.M.A. 1988).

<sup>62</sup> *Taylor*, 38 C.M.R. at 394.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 395.

<sup>65</sup> See *United States v. Calo*, 19 C.M.R. 903 (1955); *United States v. Grubb*, 6 C.M.R. 550 (1952).

The analysis to the *Manual* cites *United States v. Taylor*<sup>59</sup> to support the assertion that self-injury without intent to avoid service is a lesser-included offense of malingering.<sup>60</sup> Unfortunately, a careful reading of *Taylor* provides no answers to the practical problems that confront an attorney seeking to understand the self-injury offense included in malingering.

While confined in the brig at a naval depot,<sup>61</sup> Seaman Recruit Taylor inflicted minor cuts on his arms with a razor blade. He subsequently was charged with malingering under UCMJ article 115. At trial, the law officer instructed the general court-martial not only on malingering, but also on a lesser-included offense of intentional self-injury. The latter offense differed from malingering in two respects: (1) it lacked the element of a purpose to avoid service; and (2) it contained the element under UCMJ article 134 of constituting a disorder to the prejudice of good order and discipline in the Armed Forces.<sup>62</sup>

The court-martial found Taylor guilty of intentional self-injury. In upholding this finding, the Court of Military Appeals rejected Taylor's argument that "Congress intended Article 115 to preempt the field for all intentional self-injur[ies]."<sup>63</sup> The court observed that an offense of self-injury existed as a form of conduct prejudicial to good order before Congress enacted the UCMJ. The court found nothing in the language of article 115 or in the legislative history of the UCMJ to show that Congress intended to abolish the self-injury offense.<sup>64</sup>

The ruling of the Court of Military Appeals resolved a conflict among the boards of review. The Air Force Board of Review had ruled consistently that intentional self-injury under article 134 was a lesser-included offense of malingering.<sup>65</sup> The Army Board of Review initially had held that

the lesser offense existed,<sup>66</sup> but less than two years later had adopted the preemption theory.<sup>67</sup>

Unfortunately, the Court of Military Appeals failed to enumerate the elements of the intentional self-injury offense. *Taylor* seems to require no more than intentional self-injury under circumstances having a direct, adverse effect upon good order and discipline;<sup>68</sup> however, the self-injury offense that existed in the Army before Congress enacted the UCMJ included the additional element that the self-injury must impair the accused's ability to perform military duties.<sup>69</sup> The Army's 1949 *Manual for Courts-Martial* provided, "Any willfully and wrongfully self-inflicted injury which results in temporary or permanent impairment of the ability of a person to perform military duty may be punishable . . . as a disorder to the prejudice of good order and military discipline."<sup>70</sup> The form specification for this offense averred that the accused did "willfully injure himself [or herself]" by a particular means, "thereby unfitting himself [or herself] for the full performance of military service."<sup>71</sup> The maximum authorized punishment for intentional self-injury included a dishonorable discharge and confinement for seven years.<sup>72</sup>

The *Taylor* court also failed to address the issue of the maximum authorized punishment for the offense. Earlier, in *United States v. Grubb*, the Air Force Board of Review had recognized that the maximum punishment for intentional self-injury was uncertain because it was not listed in the table of

maximum punishments of the 1951 *Manual for Courts-Martial*, but it had issued no ruling on this question.<sup>73</sup> In *United States v. Burke*, the Army Board of Review applied the punishment for a service-discrediting disorder under article 134.<sup>74</sup> Accordingly, it limited the accused's confinement to four months and ruled that no punitive discharge could be adjudged.<sup>75</sup>

Analysis of *Burke*,<sup>76</sup> however, reveals that the finding the convening authority approved actually did not encompass intentional self-injury as that offense had existed before the enactment of the UCMJ. Sergeant Burke was found guilty of malingering under UCMJ article 115 for intentionally cutting his wrist to avoid service as an enlisted soldier. The convening authority disapproved the finding that Burke had acted with the intent to avoid service, but approved a finding that the accused had wrongfully injured himself in violation of article 134. The Government did not allege, and the court-martial did not find, that the self-injury had impaired Burke's ability to perform his duties.<sup>77</sup> Accordingly, the finding that the convening authority approved addressed only a form of disorderly conduct, not the intentional self-injury offense described in the 1949 *Manual*.<sup>78</sup>

The questions concerning the prosecution of intentional self-injury as a lesser-included offense of malingering could be resolved by changing the current *Manual for Courts-Martial*.<sup>79</sup> Meanwhile, the approaches that trial counsel and

<sup>66</sup> *United States v. Burke*, 14 C.M.R. 365 (1954).

<sup>67</sup> *United States v. Jacobs*, 20 C.M.R. 458 (1955).

<sup>68</sup> *Taylor*, 38 C.M.R. at 395.

<sup>69</sup> *Grubb*, 6 C.M.R. at 555-58 (Gingery, J.A., concurring in part and dissenting in part). The focus on the effect of the accused's behavior upon his or her fitness for duty, rather than on the accused's actual intent, also characterizes the UCMJ article 134 offense of incapacitation for performance of duties through prior, wrongful indulgence in an intoxicating liquor or drug. See MCM, 1984, Part IV, para. 76.

<sup>70</sup> *Manual for Courts-Martial*, U.S. Army, 1949, para. 183a [hereinafter MCM, 1949]. The offense was punishable under the general article of the Articles of War. See Articles of War, art. 96 (1948).

<sup>71</sup> MCM, 1949, app. 4, para. 177.

<sup>72</sup> MCM, 1949, para. 117c, table of maximum punishments, at 141. The 1949 *Manual* identified this offense as "self-maiming." A footnote explained that this maximum punishment did not apply to the offense of self-maiming with the intent to avoid hazardous duty or to shirk important service. This more serious offense, analogous to the present-day offense of malingering, could be punished under article 75 of the Articles of War as misbehavior before the enemy, a crime punishable by death. See MCM, 1949, para. 163a.

<sup>73</sup> *Grubb*, 6 C.M.R. at 554-55.

<sup>74</sup> *Burke*, 14 C.M.R. at 366.

<sup>75</sup> *Manual for Courts-Martial*, United States, 1951, para. 127c. The 1969 and 1984 *Manuals for Courts-Martial* maintained the same maximum sentence for disorderly conduct committed under service-discrediting circumstances. See MCM, 1984, Part IV, para. 73e(1)(a); *Manual for Courts-Martial*, United States, 1969, para. 127c.

<sup>76</sup> *Burke*, 14 C.M.R. at 366.

<sup>77</sup> *Id.*

<sup>78</sup> MCM, 1949, para. 183a; *id.*, app. 4, para. 177.

<sup>79</sup> The author's proposed changes to the 1984 *Manual* appear in the appendix to this note.

defense counsel adopt in particular cases must reflect the degree to which the allegations against the accused recapitulate the self-injury offense defined in the 1949 *Manual*.

For example, a trial counsel should allege and prove that the self-injury impaired the ability of the accused to perform military duties. The trial counsel then could argue that the maximum punishment for the offense is identical to the maximum punishment for malingering because the two offenses are closely related.<sup>80</sup> On the other hand, whenever a trial counsel fails to allege or to prove that the self-injury left the accused unfit to perform his or her duties, the defense counsel should argue that—at most—the Government has proved only the minor offense of disorder.<sup>81</sup>

The court-martial of a soldier charged with malingering during Operation Desert Storm illustrates the challenges that counsel will face until the *Manual* is amended.<sup>82</sup> The accused, Specialist Ramsey, was a soldier in the Third Armored Division. Soon after his arrival in Saudi Arabia in January 1991, Ramsey learned that his wife had been unfaithful to him. She also informed him in a telephone conversation that she planned to abandon their children, aged three and five, in Germany. A short time later, after a conversation with a chaplain, the wife relented, saying that she would remain in Germany with the children.

Two weeks later, the Coalition Forces attacked Iraq. Eight days after hostilities began, Ramsey shot himself in the left shoulder with a single round from his M-16 rifle. Ramsey's unit then had to evacuate him to Germany for medical treatment and Ramsey did not rejoin his unit until after the liberation of Kuwait.

Initially, Ramsey claimed the rifle had discharged accidentally while he was cleaning it. He soon changed his story, however, admitting that he had shot himself intentionally. The second explanation was more plausible. While awaiting deployment to Saudi Arabia, Ramsey had been hospitalized and treated for depression. Unit leaders considered him a good soldier, but emotionally weak.

The shooting had at least two adverse effects on the unit. First, it deprived the unit of its only school-trained chemical

operations specialist. Second, after Ramsey shot himself, the unit commander instituted extremely strict controls over the distribution of ammunition. For two weeks after the shooting, soldiers in the unit were not allowed to carry ammunition, even while on guard duty.

Circumstantial proof that Ramsey intentionally shot himself to avoid service<sup>83</sup> included the nonlethal location of the wound and the timing of the shooting—several weeks after Ramsey's family crisis, but only two days after his unit moved to an assembly area in the Arabian desert. On the other hand, the defense counsel could point to the severity of Ramsey's family problems, his recent medical history of depression, and the opinions of unit noncommissioned officers that Ramsey was a good soldier. The parties ultimately avoided the uncertainties of proof on this issue when the accused agreed to plead guilty to the lesser-included offense of intentional self-injury without intent to avoid service.

Although the terms of the plea agreement allowed the accused to delete the words, "for the purpose of avoiding service as an enlisted person" from the malingering specification,<sup>84</sup> they also required the accused to add the phrase, "thereby temporarily incapacitating himself from performing military duties, such conduct being prejudicial to good order and discipline of the armed forces." Consequently, the plea satisfied the element of the self-injury offense described in the 1949 *Manual* that the injury adversely affect the ability of the accused to perform his or her duties.<sup>85</sup>

Because of the uncertainty under the current *Manual* about the maximum punishment for intentional self-injury, the providence inquiry was unusually complicated. The military judge advised the accused of a variety of possible punishments, from the authorized maximum punishment for disorder under service-discrediting circumstances<sup>86</sup> to the maximum penalty for malingering in a hostile fire pay zone.<sup>87</sup> The judge then obtained the accused's assurance that the accused wanted to plead guilty, regardless of the maximum punishment that would apply.<sup>88</sup> This approach, necessitated by the deficiency of the *Manual*, resulted in a lengthy, difficult providence inquiry and created a fertile ground for assertions of error on appeal.

<sup>80</sup> See R.C.M. 1003(c)(1)(B)(i) ("For an offense not listed in Part IV of this Manual which is included in or closely related to an offense listed therein the maximum punishment shall be that of the offense listed").

<sup>81</sup> See Burke, 14 C.M.R. 365.

<sup>82</sup> United States v. Ramsey, CM 91-01640, (A.C.M.R. filed Nov. 21, 1991).

<sup>83</sup> MCM, 1984, Part IV, para. 40b(3).

<sup>84</sup> *Id.*, para. 40f.

<sup>85</sup> MCM, 1949, para. 183a; *id.*, app. 4, para. 177.

<sup>86</sup> MCM, 1984, Part IV, para. 73c(1)(a) (confinement for four months and forfeiture of two-thirds pay per month for four months).

<sup>87</sup> *Id.*, para. 40e(4) (dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years).

<sup>88</sup> See Dep't of Army, Pam. 27-9, Military Judges' Benchbook, para. 2-14 (C3, 15 Feb. 1989).

The current state of uncertainty easily could be resolved by amending the *Manual*. Until then, counsel should look back more than forty years to the 1949 *Manual* for guidance about the intentional self-injury offense included in malingering. Lieutenant Colonel Bowe, Deputy Staff Judge Advocate, Office of the Staff Judge Advocate, Headquarters, V Corps, Frankfurt, Germany.

## Appendix

### Proposed Changes

#### to the 1984 *Manual for Courts-Martial*

1. Part IV of the *Manual for Courts-Martial*, United States, 1984, is amended by inserting the following new paragraph after paragraph 103:

"103a. Article 134 (Self-injury without intent to avoid service)

a. *Text*. See paragraph 60.

b. *Elements*.

(1) That the accused was assigned to, or was aware of prospective assignment to, or availability for, the performance of work, duty, or service;

(2) That the accused intentionally inflicted injury upon himself or herself;

(3) That temporary or permanent impairment of the ability of the accused to perform work, duty, or service resulted from the injury; and

(4) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

[Note: If the offense was committed in time of war or in a hostile fire pay zone, add the following element]

(5) That the offense was committed (in time of war) (in a hostile fire pay zone).

c. *Explanation*.

(1) *Nature of offense*. This offense differs from malingering (see paragraph 40). To be guilty of this offense, the accused need not have harbored a design to avoid performance of any work, duty, or service

that properly or normally may be expected of one in the military service. This offense is characterized by intentional self-injury resulting in impairment of the ability of the accused to perform duty, rather than by the purpose to shirk.

(2) *How injury inflicted*. See paragraph 40c(2).

d. *Lesser included offense*. Article 80— attempts.

e. *Maximum punishment*.

(1) *Intentional self-inflicted injury*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

(2) *Intentional self-inflicted injury in time of war or in a hostile fire pay zone*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

f. *Sample specification*.

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required) on or about \_\_\_\_\_ 19\_\_\_\_, willfully injure himself/herself by \_\_\_\_\_,

thereby unfitting himself/herself for the full performance of (work in \_\_\_\_\_) (duty as \_\_\_\_\_) (service as an enlisted person)."

2. Appendix 12 of the *Manual for Courts-Martial*, United States, 1984, is amended to include the following entry after Article 134 (Seizure, destruction, removal, or disposal of property to prevent):

Self-injury without intent to avoid service

In time of war, or while receiving special pay under 37 U.S.C. § 310

..... DD 5 yrs. Total

Other ..... DD 2 yrs. Total

3. Appendix 21 of *Manual for Courts-Martial*, United States, 1984, is amended to include the following entry after the analysis of paragraph 103:

103a. Article 134 (Self-injury without intent to avoid service)

c. *Explanation.* This offense is based on paragraph 183a of MCM, U.S. Army, 1949; *United States v. Taylor*, 17 U.S.C.M.A. 595, 38 C.M.R. 393 (1968).

e. *Maximum punishment.* The maximum punishment for subsection (1) reflects the serious effect that this offense may have on readiness and morale. The maximum punishment reflects the range of the effects of the injury, both in degree and duration, on the ability of the accused to perform work, duty, or service. The maximum punishment for subsection (1) is equivalent to those for offenses of desertion, missing movement through design, and certain violations of orders. The maximum punishment for subsection (2) is less than the maximum punishment for the offense of malingering under the same circumstances because of the absence of the specific intent to avoid work, duty, or service. The maximum punishment for subsection (2) is equivalent to those for aggravated offenses of desertion, willfully disobeying a superior commissioned officer, and nonaggravated malingering by intentional self-inflicted injury.

f. *Sample specification.* See appendix 4, paragraph 177 of MCM, U.S. Army, 1949.

#### The First Basic Procurement Fraud Course

The First Basic Procurement Fraud Course, SF-F36, will be held from 30 November to 1 December 1992. This new course replaces the Procurement Fraud Course, which was held annually from 1987 to 1991. The new course will provide basic instruction on (1) the legal and practical aspects of advising installation-level contracting and investigatory personnel about procurement fraud matters; and (2) coordinating available contractual, civil, criminal, and administrative remedies in fraud cases. Topics that will be addressed during the two-day course include indicators of fraud; criminal investigations; and criminal, contract, administrative, and civil remedies for procurement fraud. Instructors also will cover cost principles, defective pricing, product substitution, actions against government employees, coordination of remedies, and the role of the Procurement Fraud Division, Office of The Judge Advocate General

(OTJAG) in combatting Army procurement fraud. The Basic Procurement Fraud Course will be open to all active duty, Reserve Component, and civilian attorneys in government service who are detailed as procurement fraud advisors (PFAs) or procurement fraud irregularities coordinators (PFICs) or are expected to serve in either capacity in the future. Staff judge advocates and command counsel must obtain a quota for this course through the Army Training Requirements and Resources System (ATRRS). The procedures for obtaining a quota are described in this issue of *The Army Lawyer* in *CLE News*, *infra* page 62.

The OTJAG Procurement Fraud Division intends to present an Advanced Procurement Fraud Workshop for experienced PFAs and PFICs to complement the Basic Procurement Fraud Course. The first advanced workshop has been scheduled tentatively for May 1993. Major Borch.

### International Law Note

#### Perfecting an International Code of Crimes

Last year, the movement to promote the effective enforcement of international law took a giant step forward. On 11 September 1991, the International Law Commission (Commission), an agency of the United Nations (U.N.), presented the "Draft Code of Crimes Against the Peace and Security of Mankind"<sup>89</sup> to the U.N. The Commission invited the member nations to submit their comments on this international criminal code by January 1993.<sup>90</sup> When the nations complete their reviews, the Commission will revise the draft, taking into consideration the recommendations and observations of the commenting states.<sup>91</sup>

The U.N. General Assembly created the Commission on 21 November 1947 and directed it to consolidate in a single code<sup>92</sup> the principles established at the Nuremberg war crimes tribunal. When it charged the Commission with this duty, the General Assembly evidently viewed the drafting of this code as a matter of vital importance. The draft project, however, raised many controversial issues and suffered frequent setbacks. The Commission finally submitted an initial draft code to the General Assembly in 1954, but, by then, the political dynamics of the Cold War had made many influential nations exceptionally sensitive to the concept of an international penal code.<sup>93</sup> Lacking the support it needed for ratification, the draft code languished, virtually ignored, for twenty-seven years.

<sup>89</sup>Draft Articles on the Draft Code of Crimes Against the Peace and Security of Mankind, Sept. 11, 1991, 30 I.L.M. 1584 [hereinafter Draft Code of Crimes].

<sup>90</sup>Stephen McCaffrey, *The Forty-Third Session of the International Law Commission*, 85 Am. J. Int'l L. 703, 706 (1991).

<sup>91</sup>*Id.*

<sup>92</sup>*Id.* at 1556.

<sup>93</sup>*Id.*

In 1981, the General Assembly remitted the issue to the Commission. At its forty-third session—held from April to July 1991—the Commission finally arrived at a consensus. Capitalizing on the changing world order, the Commission produced the remarkable document that presently is undergoing international review.

The starting point for this massive endeavor was a "compendium of relevant international instruments," prepared by the Commission's secretariat in 1983.<sup>94</sup> In this document, the secretariat proposed a number of acts and practices for inclusion in the draft list of offenses.<sup>95</sup> In its annual report for 1984, the Commission remarked that the "first step" in the drafting process

would be to sift the acts constituting serious breaches of international law, making an inventory of the international instruments (conventions, declarations, resolutions, etc.) that regard these acts as international crimes, and selecting the most serious of them . . . [At this stage,] the acts selected would . . . be in the raw state, independent of any rigorous terminology or classification. A precise terminology and typology would be worked on later, when all the material had been selected and determined.<sup>96</sup>

The Commission based its new code on the three broad categories of offenses contained in the 1954 draft code: (1) offenses against the sovereignty and territorial integrity of a state; (2) crimes against humanity; and (3) offenses that violate the laws and customs of war.<sup>97</sup> At the same time, the Commission attempted to accommodate the growing trend to proscribe wrongs that international law previously has not prohibited as criminal offenses, such as colonialism, apartheid, serious injury to the environment, and economic aggression.<sup>98</sup> The Commission also considered proposals to criminalize the use of nuclear weapons, the use of mercenaries,

hostage-taking, hijacking, piracy, and violence against persons enjoying diplomatic privileges and immunities.<sup>99</sup>

The Draft Code of Crimes describes the criminal liabilities of individuals and the attendant responsibilities of the states in which they reside. In particular, the Code emphasizes the obligation of states to prosecute individuals for crimes against the peace and security of humanity.<sup>100</sup> Any state that finds within its territory an individual who allegedly has committed a crime proscribed by the Code will have an affirmative duty to prosecute or to extradite that individual.<sup>101</sup>

To facilitate the performance of this duty, the Code will empower the domestic courts of individual nations to apply its provisions. Domestic courts will enjoy concurrent jurisdiction under the Code with any international forum that the U.N. may create in the future. Because the international penal code will not depend on an international criminal court for its enforcement,<sup>102</sup> the ongoing debate over the creation of an international criminal forum will not affect the Code's viability. At the same time, however, article 2 of the Code emphasizes that the characterization of an act or omission as a crime against the peace and security of humanity is a determination independent of domestic law. Accordingly, a prosecuting state will be able to punish an offender for committing a crime proscribed by the Code even if the offense is not punishable under the state's domestic laws.

One unusual aspect of the Draft Code of Crimes is its failure to specify punishments for the international crimes that it proscribes. The Code's penal provisions all end with the ambiguous phrase "shall, on conviction thereof, be sentenced."<sup>103</sup> Disagreements over the penalties section of the Code generated many heated debates among the drafters. Arguments over whether to impose the death penalty were especially contentious. Because the drafters ultimately could not agree on specific punishments, the Commission tabled the issue. The drafters hope to resolve their differences after they receive the nations' comments on the Code in 1993.

<sup>94</sup> UN Doc. A/CN.4/368 (Apr. 13, 1983).

<sup>95</sup> See *id.*

<sup>96</sup> Report of the International Law Commission on the Work of the Thirty-Sixth Session, 39 U.N. GAOR, Int'l Law Comm'n, 36th Sess., Supp. No. 10, at 30, UN Doc. A/39/10 (1984) [hereinafter 1984 Report].

<sup>97</sup> *Id.* at 756.

<sup>98</sup> 1984 Report, *supra* note 96, at 30.

<sup>99</sup> *Id.*

<sup>100</sup> Draft Code of Crimes, *supra* note 89, arts. 5 and 6.

<sup>101</sup> *Id.* art. 6.

<sup>102</sup> Stephen McCaffrey, *Introductory Note on the International Law Commission Report on the Draft Articles Adopted at Its Forty-Third Session, Sept. 11, 1991*, 30 I.L.M. 1584, at 1556.

<sup>103</sup> See Draft Code of Crimes, *supra* note 89, arts. 15-26.

The second chapter of the Draft Code of Crimes identifies various general principles that the drafters adopted to afford the Code the widest possible application. This section permits a state to use common-law concepts of criminal liability to punish offenses against the peace and security of humanity. This approach would allow a state to impose criminal liability not only upon an actual perpetrator, but also upon any individual who "aids, abets, or provides the means for the commission of a crime against the peace and security of mankind or [who] conspires in or directly incites the commission of such a crime."<sup>104</sup> Additionally, any individual who *attempts* to commit a crime against humanity is liable as a principal.<sup>105</sup> An accused's criminal responsibility is not affected by the claim of an exculpatory motive if this motive is not recognized as a defense at international law or identified specifically in the Code's definition of the crime.<sup>106</sup>

The Code also establishes minimum due process guarantees for individuals charged under its punitive provisions. References to the presumption of innocence run throughout the Code,<sup>107</sup> although the drafters prescribed no quantum of evidence for overcoming that presumption.<sup>108</sup> Furthermore, the Code provides that every accused is entitled to a "fair and public hearing by a competent, independent and impartial tribunal duly created by law or treaty."<sup>109</sup> A prosecuting state or international agency must advise each accused of the charges against which he or she must defend, conveying this information promptly and concisely in a language that the accused will understand. Moreover, the accused must be granted adequate time to consult with counsel and to prepare a defense.<sup>110</sup> The rights of the accused to trial without undue delay, to be present at trial, to defend himself or herself in person, and to be informed of the right to free legal assistance all are secured in article 8 of the Code.<sup>111</sup> Finally, an individual charged with an offense under the Draft Code will have the right against self-incrimination, the right to confront and to cross-examine accusers, the right to call witnesses on his or her behalf, and the right to the free assistance of an

interpreter if one is needed.<sup>112</sup> Ostensibly, domestic courts will have to respect these rights in the trial of any person charged with violating the Code, even when no corresponding due process guarantees exist under the prosecuting state's domestic criminal procedures. Accordingly, the Draft Code of Crimes should expand concepts of fundamental due process significantly in many nations that currently lack these safeguards.

As a general rule, the Code provides that no accused may be placed in jeopardy more than once for the same offense, even when different sovereigns or an international tribunal are involved. Article 9 provides,

No one shall be tried or punished for a crime under this Code in respect of an act for which he has already been finally convicted or acquitted by a national court, provided that, if a punishment was imposed, it has been enforced or is in the process of being enforced.<sup>113</sup>

Accordingly, jurisdiction for offenses under the Code may be exercised by an international criminal court, or by a domestic court, but not by both.

Despite these provisions, however, the Code takes the jurisdictional issue one controversial step further. It states that, under some circumstances, a national court *may* try and punish an individual, even though another nation's court has convicted or has acquitted the individual for the same offense. This dual prosecution can occur if "the act that was the subject of the previous judgment took place in the territory of that State seeking a subsequent trial . . . or . . . if that State seeking another trial . . . [was] the main victim of the crime."<sup>114</sup> When the Code permits an individual to be placed in jeopardy twice for the same offense, it softens the blow by requiring the subsequent trial court to deduct from its sentence any penalty imposed on the accused as a result of the accused's previous conviction for the same act.<sup>115</sup>

<sup>104</sup>*Id.* art. 3.

<sup>105</sup>*Id.*

<sup>106</sup>*Id.* art. 4.

<sup>107</sup>*Id.* art. 8.

<sup>108</sup>The Draft Code of Crimes does not state expressly whether an accused's guilt must be established beyond a reasonable doubt or by some lesser standard of proof.

<sup>109</sup>*Id.* at 8(a).

<sup>110</sup>*Id.* art. 8(b)-(c).

<sup>111</sup>*Id.* art. 8(d)-(e).

<sup>112</sup>*Id.* art. 8(f)-(h).

<sup>113</sup>*Id.* art. 9(2).

<sup>114</sup>*Id.* art. 9(4)a-b.

<sup>115</sup>*Id.* art. 9(5).

To the extent that the Code creates "new crimes" that presently are not proscribed by international or domestic law, its operative provisions will have no ex post facto application.<sup>116</sup> On the other hand, nothing will protect an offender from liability under the Draft Code of Crimes for an act that clearly is criminal under international or domestic law when the offender commits it, even if the crime occurs before the Code comes into force.<sup>117</sup>

Articles 11 and 12 of the Code eliminate the defense of "superior orders" and clarify the responsibility of a superior for crimes that his or her subordinates commit against the peace and security of humanity. An accused will not escape criminal responsibility by asserting that he or she acted pursuant to the order of a superior if the accused could have refused to comply with the order.<sup>118</sup> Similarly, a subordinate's superiors will not be relieved of criminal liability if "they [know] or [have] information enabling them to conclude, in the circumstances at the time, that the subordinate [is] committing or [is] going to commit . . . a crime [against humanity] and . . . they [do] not take all feasible measures within their power to prevent or [to] repress the crime."<sup>119</sup> The drafters clearly designed these articles to eliminate the excuses most frequently offered by individuals accused of committing war crimes during World War II. For example, the standard that article 12 expresses for establishing the criminal responsibility of a superior comports closely with the criteria established during the trials of war criminals in the 1940's.<sup>120</sup>

Finally, the Code does not attempt to articulate permissible defenses or proper extenuating circumstances. The drafters left this task to the courts that will preside over these issues. Apparently, this was a compromise that the drafters adopted because the issues surrounding certain defenses were too controversial for easy resolution.<sup>121</sup>

## Crimes Against the Peace and Security of Humanity

The substantive crimes delineated by the Draft Code of Crimes comprise twelve separate articles.<sup>122</sup> These articles not only codify offenses previously proscribed in various treaties and customary international law, but also establish entirely new offenses. Following the example of the U.N. Charter,<sup>123</sup> the Code absolutely proscribes the aggressive use of force, or the threat to use aggressive force, to resolve an international dispute.<sup>124</sup> Article 15 of the Code, however, extends this principle beyond the provisions of the U.N. Charter by defining aggression precisely and by criminalizing specific aggressive acts. In language adopted almost verbatim from the General Assembly's Resolution on Aggression,<sup>125</sup> the Code forbids the use of armed force against the "sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations."<sup>126</sup> The first use of force by any nation will constitute a prima facie act of aggression and a presumptive violation of the Code.<sup>127</sup>

Article 15 also sets forth a "laundry list" of unlawful aggressive acts. These acts include invasions; raids; the occupation or annexation of one state's territory by the armed forces of another state; blockading the ports or coasts of another state; allowing individuals or groups to use national territory as a base from which to commit aggressive acts outside the host nation; and sponsoring armed bands, irregulars, terrorists, or mercenaries who commit aggressive acts against another state. Articles 17 and 18 add to the prohibitions against aggression, forbidding nations to intervene in the internal or external affairs of other states and prohibiting the alien or colonial domination of one people by another. Significantly, the Code binds domestic courts to any determination by the U.N. Security Council that an act is wrongfully aggressive.<sup>128</sup>

<sup>116</sup>*Id.* art. 10.

<sup>117</sup>*Id.*

<sup>118</sup>*Id.* art. 11.

<sup>119</sup>*Id.* art. 12 [emphasis added].

<sup>120</sup>See, e.g., *In re Yamashita*, 327 U.S. 1 (1946).

<sup>121</sup>McCaffrey, *supra* note 90, at 707.

<sup>122</sup>Draft Code of Crimes, *supra* note 89, arts. 15-26.

<sup>123</sup>U.N. Charter, art. 2(4).

<sup>124</sup>Draft Code of Crimes, *supra* note 89, art. 15.

<sup>125</sup>G.A. Res. 3314, U.N. GAOR, Special Comm. on the Question of Defining Aggression, 35th Sess., U.N. Doc A/AC.134/L.46 (1974).

<sup>126</sup>Draft Code of Crimes, *supra* note 89, arts. 15(2), 16.

<sup>127</sup>*Id.* art. 15(3).

<sup>128</sup>*Id.* art. 15(4).

The term "aggression," however, does not include legitimate internal struggles for self-determination or independence. In particular, it does not describe efforts to throw off alien occupation, colonial domination, or a racist regime.<sup>129</sup> The Code does not proscribe these so-called "wars of national liberation" and a nation's citizens so engaged may seek and receive external support consistent with the provisions of the U.N. Charter.<sup>130</sup>

The Code specifically outlaws genocide,<sup>131</sup> apartheid,<sup>132</sup> systematic or mass violations of human rights,<sup>133</sup> "exceptionally serious war crimes";<sup>134</sup> the recruitment, use, financing and training of mercenaries;<sup>135</sup> the commission or instigation of acts of international terrorism;<sup>136</sup> illicit traffic in narcotic drugs;<sup>137</sup> and willful, severe damage to the environment.<sup>138</sup>

<sup>129</sup>*Id.* art. 15(6).

<sup>130</sup>*Id.* arts. 15(7), 17-18.

<sup>131</sup>*Id.* art. 19. Genocide is defined as "acts committed with intent to destroy, in whole or in part, a national, ethnic, racial, or religious group as such." *Id.* art. 19(2).

<sup>132</sup>*Id.* art. 20. Apartheid consists of acts "based on policies and practices of racial segregation and discrimination committed for the purpose of establishing or maintaining domination by one racial group over any other racial group and systematically oppressing it." *Id.* art. 20(2)(c).

<sup>133</sup>*Id.* art. 21.

<sup>134</sup>*Id.* art. 22. "Exceptionally serious war crimes" include:

- (1) acts of inhumanity, cruelty or barbarity directed against the life, dignity or physical or mental integrity of persons (e.g., killing, torture, mutilation, biological experimentation, taking of hostages, etc.);
- (2) establishment of settlers in an occupied territory and changes to the demographic composition of occupied territory;
- (3) use of unlawful weapons;
- (4) employing means or methods of warfare which are intended or may be expected to cause widespread, long-term and severe damage to the natural environment;
- (5) large scale destruction of civilian property; and
- (6) wilful attacks on property of exceptional religious, historical or cultural value.

*Id.* art. 22(2).

<sup>135</sup>*Id.* art. 23. A "mercenary" is any individual who is:

- (1) specially recruited locally or abroad in order to fight in an armed conflict;
- (2) motivated to take part in the hostilities essentially by the desire for private gain;
- (3) neither a national of a party to the conflict nor a resident of the territory controlled by a party to the conflict;
- (4) not a member of the armed forces of a party to the conflict; and
- (5) not sent by a State which is not a party to the conflict on official duty as a member of its armed forces.

*Id.* art. 23(2).

<sup>136</sup>*Id.* art. 24.

<sup>137</sup>*Id.* art. 25. "Illicit traffic in narcotic drugs" means any production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drug or any psychotropic substance contrary to internal or international law. *Id.* art. 25(3).

<sup>138</sup>*Id.* art. 26.

Conclusion: The International Law Commission's Draft Code of Crimes is a milestone in the evolution of the rule of law. The creation of criminal norms that the nations of the world will accept and apply universally will enhance world order immeasurably. Judge advocates should find that the Code will help to ensure that nations engaged in armed conflict comply with the provisions of the laws of war. The commission of serious war crimes ostensibly will invite the same treatment that piracy, slavery, and similar "universally condemned offenses" now receive.

The final "Code of Crimes Against the Peace and Security of Mankind" may resemble only slightly the document that

was a product of the Commission's work. The Commission's work is a milestone in the evolution of the rule of law. The creation of criminal norms that the nations of the world will accept and apply universally will enhance world order immeasurably. Judge advocates should find that the Code will help to ensure that nations engaged in armed conflict comply with the provisions of the laws of war. The commission of serious war crimes ostensibly will invite the same treatment that piracy, slavery, and similar "universally condemned offenses" now receive.

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the International Law Commission sent to the states last year. Nevertheless, one critical point should guide the states in their deliberations: By adopting the Code, they will establish international minimum standards for acceptable human behavior. With the establishment of these standards, the human race will take a giant step toward a universal acceptance of the rule of law. Lieutenant Commander Rolph.

### **Legal Assistance Items**

The following notes have been prepared to advise legal assistance attorneys of current developments in the law and in legal assistance program policies. They also can be adapted for use as locally published preventive law articles to alert soldiers and their families about legal problems and changes in the law. We welcome articles and notes for inclusion in this portion of *The Army Lawyer*. Send submissions to The Judge Advocate General's School, ATTN: JAGS-ADA-LA, Charlottesville, VA 22903-1781.

#### **1991 Chief of Staff Award for Excellence in Legal Assistance**

Of the 144 Army legal offices having one or more attorneys providing legal assistance on a full- or part-time basis, twenty-nine have been awarded the 1991 Chief of Staff Award for Excellence in Legal Assistance. Congratulations to legal assistance offices on the following installations:

U.S. Army Logistics Center and Fort Lee  
U.S. Army Training Center and  
Fort Jackson  
U.S. Army Engineer Center and  
Fort Leonard Wood  
Headquarters, 101st Airborne Division and  
Fort Campbell  
Headquarters, U.S. Army South  
Headquarters, 3d Infantry Division  
32d Army Air Defense Command  
U.S. Army Field Artillery Center and  
Fort Sill  
Headquarters, XVIII Airborne Corps and  
Fort Bragg  
Headquarters, 82d Airborne Division

U.S. Army Aviation Center and Fort Rucker  
Headquarters, 21st TAACOM  
Headquarters, 25th Infantry Division  
U.S. Army Garrison, Fort Detrick  
U.S. Army CECOM and Fort Monmouth  
U.S. Army CECOM—Vint Hill Division  
U.S. Army TECOM—Aberdeen  
Proving Ground  
Headquarters, 1st Armored Division  
U.S. Army Berlin  
United States Military Academy  
U.S. Army Chemical and MP Centers and  
Fort McClellan  
21st TAACOM—Brussels  
V Corps—Fulda Branch  
U.S. Army Garrison, Fort McPherson  
Headquarters, 10th Mountain Division and  
Fort Drum  
Headquarters, 1st Infantry Division and  
Fort Riley  
Headquarters, I Corps and Fort Lewis  
Headquarters, V Corps  
Headquarters, U.S. Army Japan and  
IX Corps

### **Tax Notes**

#### **More on Individual Retirement Account Distributions<sup>139</sup>**

Many taxpayers who have individual retirement accounts<sup>140</sup> (IRAs) maturing in certificates of deposit (CD) find that they face lower interest rates when they renew their IRAs. Consequently, some decide to receive their IRA funds and to delay rolling them over into other IRAs until they can find better rates of return. If a taxpayer completes the rollover<sup>141</sup> into another IRA within sixty days, he or she will suffer no penalty for withdrawing the funds prematurely<sup>142</sup> and the distribution will not be included in the taxpayer's gross income. The Internal Revenue Service (IRS), however, enforces the sixty-day deadline very strictly. It normally will penalize a taxpayer for failing to complete the rollover even if the taxpayer is not at fault.<sup>143</sup>

<sup>139</sup>See generally TJAGSA Practice Note, *Distributions From Individual Retirement Arrangements*, *The Army Lawyer*, June 1990, at 54 (discussing the tax consequences of IRA distributions).

<sup>140</sup>I.R.C. § 408 (Maxwell Macmillan 1991).

<sup>141</sup>The term "rollover" describes a transaction in which an IRA trustee pays IRA proceeds to the IRA owner, rather than transferring the funds directly to another IRA trustee. Distributions from an IRA are includable in the recipient's gross income in the year in which the distribution is received. *Id.* § 408(d)(1). This rule, however, does not apply when the entire amount of the distribution is rolled over into another IRA within 60 days of the taxpayer's receipt of the distribution. *Id.* § 408(d)(3)(A)(i).

<sup>142</sup>The premature withdrawal penalty applies if the taxpayer is less than 59 years and six months old when the distribution begins. Treasury Reg. § 1401-1(c) (Maxwell Macmillan 1991). A taxpayer may invest IRA funds in any investment vehicle during this 60-day period. *Id.* Unless the investment is tax-exempt, however, any income generated during this period will be includable in the taxpayer's gross income for the tax year in which the investment occurred. *Id.* When the taxpayer rolls the IRA funds over, income earned during the 60-day period is not rolled into the new IRA.

<sup>143</sup>See, e.g., Priv. Ltr. Rul. 9211035 (1992); Priv. Ltr. Rul. 8824047 (1988).

In a recent letter ruling, the IRS addressed a situation in which a taxpayer curtailed his qualified plan and directed his investment manager to roll over his balance into an IRA, allocating the assets among five different mutual funds. The clerk handling the transaction for the investment manager properly registered four of the five mutual funds. Because of an error, however, the clerk failed to register the fifth fund. When the error was detected several months later, the taxpayer confirmed the earlier instructions. The IRS treated the distribution as an IRA rollover, but decided that the taxpayer had not completed the rollover into the fifth mutual fund within the allowed sixty days.

In *Aronson v. Commissioner*,<sup>144</sup> the Tax Court considered the plight of taxpayers who had established several IRA CDs in a savings and loan that subsequently went into conservatorship. The taxpayers ultimately recovered their IRA funds from the state deposit insurance fund, but they failed to roll the proceeds over into other IRAs within the sixty-day period. The Tax Court determined that the IRA proceeds were includable in the taxpayers' gross incomes for the year in which the proceeds were received because the taxpayers did not complete their rollovers by the statutory deadline.

Conscientious taxpayers may find that the Tax Court is not totally unsympathetic to their difficulties. In *Wood v. Commissioner*,<sup>145</sup> a taxpayer personally delivered to an investment agent the funds that were to be rolled over; he also completed the paperwork required to establish the new IRA into which the funds would be deposited. After assuring the taxpayer that the deposit would be made, the investment agent accidentally deposited the IRA funds into a non-IRA account. The mistake was not discovered until after the sixty-day rollover period had expired. The IRS subsequently issued a deficiency notice, seeking to include the distribution in the taxpayer's gross income. The Tax Court found for the taxpayer. Focusing on the taxpayer's conduct, the court ruled that the bookkeeping error should not defeat the desired rollover treatment in the instant case.<sup>146</sup>

*Wood* suggests that a taxpayer who was prevented by a trustee's error from completing a rollover within the sixty-day deadline may find relief if the taxpayer was not responsible for the error. Nevertheless, a legal assistance attorney (LAA) always should advise a taxpayer to complete a rollover transaction within sixty days. Aggressive collection is a hallmark

of the IRS and decisions like *Aronson* show that taxpayers should not rely on the Tax Court to moderate the IRS's approach. Major Hancock.

**Divorce Tax—Individual Liability Following Joint Return Filing**

Husbands and wives who file joint income tax returns are jointly and severally liable for the tax.<sup>147</sup> An LAA who advises a client experiencing domestic and financial difficulties should alert the client to the tax consequences that could arise if only one of two spouses resorts to bankruptcy. A recent Tax Court decision, *Kroh v. Commissioner*,<sup>148</sup> illustrates these consequences clearly. Caroline Kroh and her husband filed joint federal income tax returns for several years. After the IRS issued notices of deficiency against the Krohs, Mr. Kroh was adjudicated bankrupt. Mr. Kroh's bankruptcy trustee and the IRS entered a settlement agreement for part of the outstanding tax liability. Subsequently, the IRS continued its deficiency action, seeking to recover the full amount of the tax deficiency from Mrs. Kroh. Mrs. Kroh appeared before the Tax Court and moved for summary judgment to stop the IRS action. The Tax Court, however, noted that Mrs. Kroh had not participated in her husband's bankruptcy proceedings and had not been a party to the settlement agreement. Relying on section 6013 of the Internal Revenue Code, the court determined that the IRS could proceed separately against Mrs. Kroh to recover the unpaid portion of the tax liability. Major Hancock.

#### Consumer Law Note

#### Billwatch—House Bill 643 and Senate Bill 316: Garnishment of Federal Pay

Legal assistance attorneys should pay close attention to House Bill 643<sup>149</sup> and Senate Bill 316.<sup>150</sup> These identical bills propose to eliminate existing restrictions on the garnishment of federal salaries. Passage of the bills, collectively entitled the "Garnishment Equalization Act of 1991," substantially will affect legal assistance clients and the advice that their attorneys provide.

<sup>144</sup>98 T.C. 23 (1992).

<sup>145</sup>93 T.C. 12 (1989).

<sup>146</sup>*Id.* at 11. The court also noted that the taxpayer's conduct was not responsible for the error. The court also noted that the taxpayer's conduct was not responsible for the error. The court also noted that the taxpayer's conduct was not responsible for the error.

<sup>147</sup>I.R.C. § 6013(d)(3) (Maxwell Macmillan, 1991).

<sup>148</sup>98 T.C. 29 (1992).

<sup>149</sup>H.R. 643, 102d Cong., 1st Sess. (1991).

<sup>150</sup>S. 316, 102d Cong., 1st Sess. (1991).

The proposed law would apply the remedy of garnishment equally to all debtors. Ostensibly, this would benefit federal employees by inducing lenders to offer them credit. Explaining this theory, one proponent of Senate Bill 316 remarked, "Knowing that garnishment is unavailable against a defaulting federal employee could influence a lender to withhold approval of loans for such employees. By extending the remedy of garnishment, this legislation may help prevent a credit crunch for creditworthy federal employees."<sup>151</sup>

As many LAAs are aware, the inability of a service member to obtain credit is a problem that seldom arises in our offices. Our military clients routinely are preyed upon by unscrupulous salespersons eager to extend credit for merchandise ranging from discount photographic coupons to encyclopedias. Under existing law, creditors and debt collectors seeking recovery from a service member after his or her default cannot resort to court-ordered garnishment of the service member's military wages. Presently, military wages may be garnished only to pay a service member's child support and alimony obligations.<sup>152</sup>

Creditors and debt collectors seeking to enforce contracts detrimental to legal assistance clients rarely take defaulted clients to court. The costs involved, and the lack of garnishment as a remedy, prompt many creditors to settle cases, to cancel contracts, or to write off debts.

If enacted, the Garnishment Equalization Act of 1991 would open an avenue of collection heretofore unavailable to creditors and debt collectors. This may create significant problems for service members—particularly because the proposed act, in its present form, grants no exceptions for default judgments. Admittedly, a service member who cannot appear in a civil lawsuit because of exigencies of military service may reopen a default judgment or request a stay of court proceedings pursuant to the Soldiers' and Sailors' Civil

Relief Act (SSCRA).<sup>153</sup> Even so, a court may misapply the SSCRA or the service member may lack the financial resources to travel to the appropriate court and reopen a default judgment. At least one federal court has refused to enjoin the military from garnishing a service member's wages for child support pending the service member's efforts to reopen the default judgment—allegedly entered in violation of the SSCRA—that established the support obligation.<sup>154</sup>

When the Senate Subcommittee on Federal Services, Post Office, and Civil Service concluded hearings on Senate Bill 316 on March 5, 1992,<sup>155</sup> House Bill 643 had 143 cosponsors and Senate Bill 316 had twenty-five cosponsors.<sup>156</sup> Legal assistance attorneys should watch the next session of Congress closely for further developments. Major Hostetter.

### The Qualitative Management Program Appeal Process

Current congressional guidance mandates a gradual reduction in Army personnel strength through 1995.<sup>157</sup> The consequent reshaping of the Army's force structure will focus attention on soldiers who are recommended for elimination under the Qualitative Management Program (QMP).<sup>158</sup> Already, LAAs regularly encounter as clients enlisted soldiers facing bars to reenlistment under the provisions of the QMP.<sup>159</sup>

The QMP bar is not meant to be rehabilitative.<sup>160</sup> Rather, it is designed to deny the opportunity to reenlist to a soldier who has been identified through the qualitative screening program as failing to meet Army standards.<sup>161</sup>

The latest Department of the Army (DA) statistics reveal that approximately eighty percent of the soldiers selected for elimination under the QMP file appeals.<sup>162</sup> Approximately twenty percent of these appeals are approved.<sup>163</sup>

<sup>151</sup> 137 Cong. Rec. S1389 (daily ed. Jan. 31, 1991) (statement of Sen. Craig).

<sup>152</sup> See 42 U.S.C. §§ 659-662 (1988).

<sup>153</sup> See 50 U.S.C. app. §§ 520-521 (1988).

<sup>154</sup> Scheidegg v. Department of the Air Force, 715 F. Supp. 11 (D.N.H. 1989), *aff'd*, 915 F.2d 1558 (1st Cir. 1990).

<sup>155</sup> See 138 Cong. Rec. D218 (daily ed. Mar. 5, 1992).

<sup>156</sup> Bill Tracking Report, H.R. 643, available in LEXIS, Legis Library, BLTRCK file (last action date 8 Apr. 1992); Bill Tracking Report, S. 316, available in LEXIS, Legis Library, BLTRCK file (last action date 5 Mar. 1992).

<sup>157</sup> HQ, Dep't of Army, The Department of the Army Chain Teaching Program Briefing: Drawing Down the Army, at 3 (update 1, 12 Dec. 1991).

<sup>158</sup> Message, HQ, Dep't of Army, SAPA-PP, 251100Z Nov 91, subject: Public Affairs Guidance—Qualitative Management Program.

<sup>159</sup> Army Reg. 601-280, Total Army Retention Program, para. 10-1 (17 Oct. 1990) [hereinafter AR 601-280].

<sup>160</sup> *Id.*, para. 10-2b.

<sup>161</sup> *Id.*

<sup>162</sup> Message, *supra* note 158, at 5.

<sup>163</sup> *Id.*

Unfortunately, no clearly organized guidance exists to assist soldiers who desire to appeal QMP bars to reenlistment. Accordingly, an LAA seeking to help a client to file a QMP appeal must address a myriad of administrative questions in addition to the usual personnel law inquiries. To understand the QMP process, an LAA not only must research the applicable Army regulations,<sup>164</sup> but also must consult current DA messages addressing the Army drawdown. To facilitate this research, the legal assistance office should compile these messages and organize them in a drawdown book. This information then will be readily accessible to help attorneys to assist their clients. The following checklist also may assist legal assistance attorneys whose clients face QMP actions.

### *QMP Appeal Process Checklist*

#### Advice for the Client

1. Read the memorandum of notification carefully.
2. Study the statement of options.<sup>165</sup>
3. Determine the basis of the appeal. A soldier may base an appeal on improvement in the soldier's duty performance, on the existence of a material error in the soldier's personnel file that resulted in his or her selection for elimination, or on both of these factors.<sup>166</sup>
4. Seek the advice of the company commander.
5. Seek out the brigade-level retention noncommissioned officer for additional guidance.<sup>167</sup>
6. Draft a personal statement. A soldier should begin writing the first draft of this statement immediately after he or she decides to appeal.
7. Seek out former and present commanders or supervisors who would be willing to write a statement supporting the appeal.

#### Time Constraints

1. The client must submit the appeal to his or her chain of command early enough to ensure that it will reach the United States Army Enlisted Records and Evaluation Center (USAEREC) within sixty days of the client's *notification by memorandum of selection for QMP elimination*.<sup>168</sup>
2. If the client has at least seventeen years and nine months of active federal service on the effective date of the notification memorandum, the client may be extended on active duty until he or she becomes eligible for retirement.<sup>169</sup>
3. If the client has less than ninety days remaining before his or her current term of service expires, the client may be extended on active duty to allow the client's appeal to be processed.<sup>170</sup>
4. If the client is on a promotion standing list when he or she receives QMP notification, but the client's current term of service expires after the retention control point date for the client's current rank, the client may be extended on active duty to allow the client's appeal to be processed.<sup>171</sup>

#### Minimum Appeal Packet Contents

A soldier submitting an appeal *must* include the following materials in his or her appeal packet:

1. One copy of the memorandum of notification, along with a copy of the enclosure to the notification memorandum that sets forth the basis for the bar.<sup>172</sup>
2. The official military personnel file (OMPF) fiche that accompanied the notification.<sup>173</sup> This fiche must be enclosed in a sealed envelope.
3. The most recent copies of the client's DA Forms 2A and 2-1.<sup>174</sup> If the QMP action is based on an adverse efficiency report, the client also should enclose a copy of the report in question.<sup>175</sup>

<sup>164</sup> See generally AR 601-280; Army Reg. 635-200, Enlisted Personnel, (17 Oct. 1990).

<sup>165</sup> See U.S. Army Enlisted Records Evaluation Ctr., Form 51, Statement of Option to Accompany Memorandum of Notification of DA Bar to Reenlistment Under the Qualitative Management Program Enlisted Qualitative Early Separation Program (Dec. 91) [hereinafter USAEREC Form 51]. The client must mark option 1 on USAEREC Form 51 to initiate the appeal; this is the only appeal that the soldier may pursue. See AR 601-280, para. 10-6(3). Both the client and the LAA should examine these options closely because guidance expressed in the governing regulations often fails to reflect recent changes to USAEREC Form 51.

<sup>166</sup> AR 601-280, para. 10-7a. Army Regulation 601-280 identifies no other bases for appeal.

<sup>167</sup> The author owes her own understanding of the QMP appeal process to the patient assistance of Sergeant Major Dale Aberle, the retention noncommissioned officer for III Corps and Fort Hood.

<sup>168</sup> See Message, *supra* note 158, at 4. Army Regulation 601-280, which provides that the time period for submission to the chain of command is 90 days, see AR 601-280, para. 10-7a, apparently no longer reflects DA policy.

<sup>169</sup> Message, HQ, Total Army Personnel Command, TAPC-POT-SA, 221401Z Nov 1991, subject: Enlisted Qualitative Early Separation Program.

<sup>170</sup> AR 601-280, para. 10-11b.

<sup>171</sup> *Id.*, para. 10-11c.

<sup>172</sup> *Id.*, para. 10-7a.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* The contents of the appeal packet must be reviewed by the soldier's chain of command and servicing personnel service company in accordance with AR 601-280. See *id.*

## Additional Appeal Packet Contents

1. The client should include in the appeals packet the substantive text of his or her appeal, including the client's own statement and materials submitted by the client's past and current supervisors or commanders. These submissions should address the basis of the QMP bar and the actions the client has taken to improve his or her performance or to correct his or her deficiencies. Whenever possible, the client should include evidence to support these submissions; for example:

- a. Authenticated noncommissioned officer efficiency reports (NCOERs) or academic efficiency reports (AERs);
- b. Award orders;
- c. Orders revoking court-martial findings; and
- d. Orders to remove data relating to non-judicial punishment or other disciplinary actions from the client's personnel file, if those data were not removed before the USAEREC board reviewed the file.

2. The client also may include a current DA photo or—if possible—a full length picture of the client, dressed in his or her class A uniform, receiving an award.

3. The client may list examples of his or her past accomplishments—for example, receiving an associate's degree, with honors, while serving on active duty.

4. The client may list special awards that he or she has received—for instance, a Bronze Star Medal that the client received for service in Operation Desert Storm.

5. The client may include NCOERs or AERS that the client received during, or immediately after, the occurrence of the conduct upon which the client's QMP selection was based.

6. The client may describe any special service schools that he or she has attended.<sup>176</sup>

## Practical Tips for Attorneys

1. Use the DA world-wide personnel locator to find a client's past supervisors or commanders.

2. Ensure that the client's packet is professional and impressive. As a whole, the packet should be neat and well organized; in particular, it should include a table of contents and a list of exhibits.

3. With the client's permission, have the packet proofread by several competent, knowledgeable reviewers. These reviewers normally should include the client's commander, the client's battalion adjutant or personnel officer (S-1), and the non-commissioned officer in charge of the personnel and administrative center that services the client's unit. Review the packet personally before the client submits it to the chain of command.

4. Consider advising the client to prepare for the transition to civilian life in case the appeal is denied. This preparation should include financial planning,<sup>177</sup> drafting resumes and job applications, and planning to continue higher education.

5. Discuss with the client any separation benefits that the Army *currently* offers that the client may be eligible to receive. Suggest that the client consider applying for these benefits.<sup>178</sup>

6. Consider advising the client to ask his or her commander to provide a statement in the commander's portion of the appeal packet, addressing the intent of the Army Chief of Staff in drawing down the Army and explaining why the soldier does not fit the profile of soldiers who should be compelled to leave the service.<sup>179</sup>

7. Advise the client that he or she may elect to change from option 1 (appeal) to option 3 (voluntary discharge) at any time throughout the appeal process.<sup>180</sup>

<sup>176</sup> The client normally should include items mentioned in paragraphs 3 to 6 of this section if they support allegations that a material error existed in the client's file when the file was reviewed by the selection board. See generally *id.*, para. 10-8b(2). These items are otherwise redundant because they appear in the client's OMPF, which also is a part of the appeal packet. This redundancy is not necessarily harmful; if the accomplishments these documents describe are truly noteworthy, including them may work to the client's advantage by emphasizing his or her merits. The reviewing authorities, however, will recognize a needlessly repetitive recital of ordinary accomplishments as mere filler.

<sup>177</sup> See generally Message, Dep't of Army, DAPE-MPE-PD, 252047Z Jul 91, subject: Implementation of Separation Pay for Regular Army Enlisted Soldiers. The following formula dictates the amount of separation pay to which the soldier is entitled:  $1/2$  (annual base pay X years in service).

<sup>178</sup> A soldier who is eliminated through the QMP program cannot receive voluntary separation incentives or special separation benefits (VSI/SSB). During the most recent application window for VSI/SSB, a soldier who was notified of selection of QMP could *apply* for VSI/SSB if he or she was otherwise eligible to do so, although the DA would grant these separation benefits only if the soldier successfully appealed the QMP action. See Message, HQ, Total Army Personnel Command, TAPC-PDT-S, 281802Z Jan 92, subject: Enlisted Update 2 to Voluntary Early Transition Program with VSI/SSB.

<sup>179</sup> In one appeal with which the author is familiar, a commander wrote, "The Army Chief of Staff, in his introduction to the update on reshaping the Army, stated that while we must reduce the size of the Army, we will take care of our own. I believe that permitting [the appellant] to remain on active duty is in line with the Chief of Staff's intent."

<sup>180</sup> AR 601-280, para. 10-7c; see Message, *supra* note 169, at 3.

## Commander's Appeal<sup>181</sup>

1. Any commander in the client's chain of command who holds the rank of lieutenant colonel or above may appeal on the client's behalf. The commander's appeal is purely discretionary, so advise the client that this option is available so that he or she can make his or her command aware of this appeal.<sup>182</sup>

2. The commander must compare the client's current performance with the data contained in the documents used by the screening board to select the soldier for QMP.<sup>183</sup> If, after making this comparison, the commander believes that the client's current performance and potential for future service warrants retention, the commander may initiate an appeal.<sup>184</sup>

3. The burden of proof lies on the commander to convince the Standby Advisory Board (STAB) that it should overrule the USAEREC selection board's decision to eliminate the client.<sup>185</sup>

4. Higher commanders in the chain of command will add their substantive comments about the client's performance and potential and will advise the general court-martial convening authority to approve, or to disapprove, the commander's appeal.<sup>186</sup>

5. The commander's appeal is forwarded concurrently with the client's appeal. Both must arrive at USAEREC within sixty days of the day the commander presented the bar to the client.<sup>187</sup>

Captain Fair, Office of the Staff Judge Advocate, III Corps and Fort Hood, Fort Hood, Texas.

## Refund Anticipation Loans for Soldiers Receiving Income Tax Refunds

One bank operating on a military installation has cooperated with LAAs to provide refund anticipation loans (RALs) to legal assistance clients who have accounts with the bank. This cooperative arrangement, which could be copied at other installations, operates as follows:

- An LAA prepares the client's income tax return and files it electronically, instructing the IRS to deposit the tax refund directly into the client's bank account.
- As soon as the IRS has acknowledged the return (it usually does so one day after fil-

ing), the attorney provides a certification letter to the bank on the client's behalf.

- The bank quickly checks the client's credit and loans the client money up to the amount of the refund due.

The bank charges the following fees on the basis of a four-week loan:

Amount of Loan	Percentage
Up to \$561	Thirty percent (minimum of \$7.50)
\$561 to \$1999	Twenty-one percent
\$2000 or more	Eighteen percent (no maximum ceiling)

Accordingly, the bank would charge a fee of thirty dollars on a four-week RAL of \$2000. This figure is obtained by multiplying .18 by \$2000 and dividing the result by twelve.

The bank's fees compare favorably with the fees charged by commercial tax-preparers, such as H&R Block. A commercial tax-preparer typically charges from fifteen to fifty dollars to prepare a tax return, twenty-five to thirty dollars to file the return electronically, and forty to forty-five dollars as interest on a short-term loan against the taxpayer's pending refund. According to bank officials, the administrative cost of processing each loan is approximately forty dollars, but the bank provides the loans at less than their costs as a public service.

Legal assistance attorneys on the installation report that they prepared over 4500 federal income tax returns and electronically filed 4339 returns for tax year 1991. Of the 4339 taxpayers whose returns were filed electronically, only 123 requested loans from the bank. This response suggests that the RAL program may not have induced many soldiers to file electronically. Nevertheless, the 123 soldiers who took advantage of the program saved substantial sums by borrowing from the bank, rather than from a commercial tax-preparer.<sup>188</sup>

The point of contact for the RAL program is Joyce Butler. She may be reached at DSN 639-5058. Lieutenant Colonel Forrester.

<sup>181</sup> See generally AR 601-280, para. 10-9.

<sup>182</sup> See USAEREC Form 51, commander's option 1 (explaining how a commander may initiate an appeal on behalf of a soldier).

<sup>183</sup> AR 601-280, para. 10-9a.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*, para. 10-9c.

<sup>186</sup> *Id.*, para. 10-9b; see also *id.*, para. 10-7.

<sup>187</sup> Army Regulation 601-280 states that the commander "may, within 90 days of receipt of a QMP memorandum, appeal the bar based on soldier's current manner of performance and potential." See *id.*, para. 10-9a. This provision, however, evidently has been superseded—USAEREC Form 51 allows a commander only 60 days to appeal on a soldier's behalf. Cf. Message, *supra* note 158, at 4 (appeal must arrive at USAEREC within 60 days of soldier's notification of selection).

<sup>188</sup> Unfortunately, all RAL programs may be in jeopardy now that the IRS has started vigorously intercepting refunds to satisfy unpaid support payments and defaulted student loans. The IRS's interceptions of tax refunds forced the other lending institution on the installation to stop offering RALs after tax year 1990.

## Procurement Fraud Division Note

Procurement Fraud Division, OTJAG

### Army Procurement Fraud Program—Recent Developments

#### Introduction

The Army's world-wide efforts during calendar year 1991 to combat procurement fraud have yielded significant results. Army commands obtained 186 criminal indictments and convictions—an 8.8% increase over figures for 1990 and the largest annual total the Army ever has attained. Civil, administrative, and criminal restitution recoveries exceeded \$35 million—a 62.7% increase over recoveries in 1990. This is the largest amount the Army has recovered in one year, excluding the Bell Helicopter recovery in 1988. The Army suspended or debarred 584 contractors for fraudulent or poor performances, also a new high. For the second year in a row, the Army completed more suspension and debarment actions than any other agency in the Department of Defense (DOD).

Special mention should be made of United States Army Europe's (USAREUR's) efforts during 1990. It recovered over \$3 million through its remedies program and completed more than 150 debarment and suspension actions—a truly substantial success. The Eighth United States Army (Korea) presently is processing 140 potential debarments, which may have a similar impact this year.

Also worth noting are the Department of Justice's (DOJ's) fraud recoveries in fiscal year (FY) 1991. Chief among them was the record recovery of \$185 million from the Unisys Corporation. This recovery—and many others—redressed frauds perpetrated on the DOD. In all, the DOJ recovered \$340 million—an \$83 million increase over the \$257 million that it recovered in FY 1990. *Qui tam* litigation produced further recoveries of \$25.6 million.

#### The Environmental Front

The number of criminal and civil prosecutions of contractors for environmental violations is rising. In FY 1991, the Environmental Protection Agency (EPA) referred 474 civil and criminal cases to the DOJ. This represented an increase of 104 criminal environmental cases over FY 1990. In 1991, the DOD Inspector General's office listed envi-

ronmental crime among its five principle investigative concerns.

Army legal and contracting personnel working in the procurement fraud arena must ensure that contractors comply with environmental rules and regulations. Personnel that supervise contractors should be aware of the remedies available against a contractor that violates environmental laws. These remedies include termination for failure to comply with the terms of the contract, referral to law enforcement agencies for criminal investigation, and the administrative actions of suspension and debarment.

A contractor's commission of an environmental offense not only provides the basis for a termination action, but also may justify a suspension action under Federal Acquisition Regulation (FAR) 9.406-2(c) or a debarment action under FAR 9.407-2.<sup>1</sup> Many environmental violations arguably demonstrate a contractor's lack of present responsibility or integrity. Moreover, an environmental violation may support a debarment action pursuant to FAR 9.406-2(b), which empowers federal agencies to debar contractors that violate the terms of their government contracts.<sup>2</sup>

An Army procurement fraud advisor (PFA) should coordinate with local EPA representatives when a case arises that involves an environmental violation. The PFA also should check to see what action—if any—the EPA has taken against the violator. The PFA, however, must remember that EPA regulations do not prevent the Army from pursuing the suspension or debarment of a contractor for environmental violations or for noncompliance with the terms of its contract.<sup>3</sup> Actually, the Army usually will seek lead agency responsibility if Army funds support a contract or if the Army can protect its interests best by assuming primary responsibility.

The EPA has two distinct processes for suspending and debaring contractors who violate environmental laws and regulations.<sup>4</sup> The first process, the Contractor Listing Program, is narrow in scope and duration and ordinarily does not preclude a separate debarment action by the Army. The

<sup>1</sup>Fed. Acquisition Reg. 9.406-2(c), 9.407-2 (1 Apr. 1984) [hereinafter FAR].

<sup>2</sup>See FAR 9.406-2(b)(1). A "debarment official may debar a contractor, based upon a preponderance of the evidence, for . . . willful failure to perform in accordance with the terms of one or more contracts . . . or [for] a history of failure to perform, or of unsatisfactory performance of, one or more contracts." *Id.*

<sup>3</sup>See 40 C.F.R. § 15.2(c) (1991).

<sup>4</sup>See generally Criminal Law Division, The Judge Advocate General's School, U.S. Army, 1991 Procurement Fraud Course Desk Book, tab Q (12 Nov. 1991).

second process, the EPA's own suspension and debarment procedure, is more extensive. If an Army contractor's environmental violation justifies an EPA debarment, the PFA and the local EPA representative must work together to determine whether the Army, or the EPA, will act as the lead agency. This coordination is essential to avoid duplicate debarment actions against the contractor. Procurement fraud advisors, however, must not forget that *all* determinations of lead agency responsibility must be coordinated with the Procurement Fraud Division (PFD), Office of The Judge Advocate General (OTJAG).

**EPA Contractor Listing Program.** The EPA Contractor Listing Program is a program established under the Clean Water Act<sup>5</sup> (CWA) and the Clean Air Act<sup>6</sup> (CAA) direct the EPA to debar from government contracting any facility at which a criminal environmental violation has occurred.<sup>7</sup> The debarment must continue until the EPA Administrator certifies that the facility has corrected the condition that gave rise to the conviction.<sup>8</sup> The EPA notifies federal agencies of this action by including the contractor's name on the General Services Administration (GSA) lists of parties excluded from federal procurement or nonprocurement programs (GSA lists).

Debarment under the CWA is facility specific, meaning that the contractor may continue doing business with the government at other facilities that are not mentioned in the listing. The listing is automatic—that is, if a contractor is convicted of an environmental violation enumerated in the CWA, the contractor's name must go on the GSA lists. A contractor, however, probably will be listed only briefly if the contractor can resolve its technical problems quickly.

Debarment requirements and proceedings under the CAA are very similar to those of the CWA. A CAA debarment, however, can be much more extensive than a debarment under the CWA. The 1990 amendments to the CAA<sup>9</sup> authorize the EPA to extend a contractor's debarment for criminal violations of the CAA at one facility to other facilities owned or operated by that contractor.<sup>10</sup>

**Advice to All Procurement Fraud Advisors.** Virtually any contractor that violates an environmental statute or regulation may be subject to criminal prosecution or administrative sanctions. Moreover, considerable potential exists for interplay between an environmental offense and procurement fraud. Superfund contractors; contractors commissioned to clean up hazardous waste sites; dredging, construction and demolition contractors; sampling and testing contractors; manufacturers; processors; and waste disposal contractors all can violate both areas of the law simultaneously.

Federal regulations also permit the EPA to list a facility on its own initiative when, pursuant to a final agency action, it determines that a contractor has a record of continuing or recurring noncompliance with CWA or CAA standards at a facility and one of the following has occurred: (1) a federal court has convicted the contractor under the CWA or the CAA and the contractor owns, leases, or supervises the facility; (2) a state court has convicted the contractor of violating the CWA or the CAA and the contractor owns, leases, or supervises the facility; (3) the facility has violated certain administrative orders that the EPA issued under the CWA or CAA and the contractor owns, leases, or supervises the facility; (4) the EPA has issued a CAA notice of noncompliance to the contractor; or (5) the EPA has filed an enforcement action in federal court against the contractor under the CWA or the CAA for committing environmental violations at the facility.<sup>11</sup> The scope and effect of a discretionary listing are identical to those of a mandatory listing.<sup>12</sup>

**FAR Suspension and Debarment.** The EPA also may suspend and debar contractors pursuant to FAR part 9.<sup>13</sup> The EPA maintains a separate organization, called the Grants Administration Division (GAD), to perform this mission. In FY 1991, the GAD completed 238 suspension and debarment actions.

**Advice to All Procurement Fraud Advisors.** Virtually any contractor that violates an environmental statute or regulation may be subject to criminal prosecution or administrative sanctions. Moreover, considerable potential exists for interplay between an environmental offense and procurement fraud. Superfund contractors; contractors commissioned to clean up hazardous waste sites; dredging, construction and demolition contractors; sampling and testing contractors; manufacturers; processors; and waste disposal contractors all can violate both areas of the law simultaneously.

<sup>5</sup>Federal Water Pollution Control Act, ch. 518, § 1, 70 Stat. 498 (1956), as amended by Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (codified as amended in scattered sections of 33 U.S.C.).

<sup>6</sup>See 42 U.S.C.A. §§ 7401-7671q (West 1983 & Supp. 1991).

<sup>7</sup>See 33 U.S.C.A. § 1368 (West 1986); 42 U.S.C.A. § 7606 (West 1983 & Supp. 1991).

<sup>8</sup>33 U.S.C.A. § 1368(a) (West 1986); 42 U.S.C.A. § 7606(a) (West Supp. 1991).

<sup>9</sup>Clean Air Act Amendments of 1990, Pub. Law No. 101-549, 104 Stat. 2399.

<sup>10</sup>*Id.* § 705(2), 104 Stat. at 2682 (amending 42 U.S.C. § 7606(a) (1988)).

<sup>11</sup>40 C.F.R. pt. 15 (1991).

<sup>12</sup>*Id.*

<sup>13</sup>See 40 C.F.R. § 15.40 (1991); cf. FAR 9-402 (debarment policy); FAR 9-403 (defining debarring official).

Procurement fraud advisors, contract attorneys, and contracting officers must keep track of surveys, testing, hazardous waste removal, and construction contracts that are being planned or performed within their jurisdictions. They also must help to create quality assurance plans that will prevent environmental violations. When an environmental violation does occur, a PFA must work closely with local environmental officers and attorneys, contracting officers, investigative agencies, prosecutors, and the EPA to resolve the case. Coordination with the responsible EPA regional office is essential because each EPA regional administrator plays an important role in the listing program.

Procurement fraud advisors are expected to coordinate all cases with PFD. In particular, we are interested in learning about your experiences in environmental matters. Captain Sam McCahon usually is assigned Corps of Engineers (COE) and installation cases and handles most of the cases relating to the EPA. He can be reached at (703) 696-1540, DSN 226-1540.

### *Surety Fraud Update*

The Miller Act<sup>14</sup> requires a contractor that is awarded a federal contract for the construction, alteration, or repair of any public building or public work to post performance and payment bonds if the contract price exceeds \$25,000. These bonds are written instruments, executed by the contractor and a surety, that ensure that the contractor will fulfill its obligation to the government or to third parties. A performance bond, normally posted in an amount equal to the contract price, protects the government from the contractor's default. If the contractor is unable or unwilling to perform the contract, the government may require the surety to complete performance. A payment bond, on the other hand, protects the contractor's suppliers, subcontractors, and laborers. If the contractor is unable or unwilling to pay these parties for the work they have performed under the contract, the government may require the surety to pay them. For this "insurance," the contractor must pay the surety a fee—usually four to six percent of the contract price. This fee is an allowable cost on the contract.

To protect the government and third parties from losses, the FAR prescribes procedures for the use of sureties.<sup>15</sup> Acceptable security providers include corporate sureties—that is, insurance companies approved by the Department of the Treasury—and individual sureties—persons who pledge their personal assets in support of their bonds. To date, few problems involving corporate sureties have arisen. Frauds involving individual sureties, however, have generated extensive publicity; have resulted in significant dollar losses to the government; and have led to numerous criminal investigations, prosecutions, and convictions.

Section 28.203 of the FAR states that a federal agency may accept an individual as a surety for any bond other than a position schedule bond. A contracting officer, however, must determine the suitability of any individual who the contractor proposes as its surety and must ensure that the surety's pledged assets are sufficient to cover the bond obligation. The unencumbered value of the assets pledged by the individual surety must equal or exceed the amount of the bond. Moreover, the individual surety must execute, under penalty of perjury, a Standard Form 28, Affidavit of Individual Surety (SF 28 affidavit). On this form, he or she must list his or her assets, liabilities, and net worth. Each SF 28 affidavit also contains a certificate of sufficiency. This certificate must be signed by an officer of a bank or trust company, a judge or clerk of court of record, a United States attorney or commissioner, a postmaster, a collector or deputy collector of the Internal Revenue Service, or some other officer of the United States. By signing the certificate, the official attests that he or she knows the surety personally and that the assets reported in the affidavit are represented accurately.

In the last few years, Army contracting officers and procurement fraud advisors—particularly those in the COE—have reported many individual sureties to the Army Criminal Investigation Command and the Defense Criminal Investigative Service for defrauding the government. Numerous investigations have centered around allegations that purportedly wealthy individuals claimed nonexistent or overvalued assets on their SF 28 affidavits or omitted or undervalued their liabilities. One surety declared that he owned seven tons of "gold-bearing concentrate" worth \$4.5 million; however, an audit disclosed that the asset was worthless. Another individual falsely stated that he owned assets in the Australian stock market worth \$2.5 million. Yet another claimed to own 150,000 acres of land worth \$60 million. Investigators later discovered that this property actually belonged to the Bureau of Land Management.

Another aspect of individual surety fraud involves officials who sign certificates of sufficiency. One individual falsely claimed to be a federal judge, while others, purportedly officers of banks or trust companies, actually were automobile mechanics, meat cutters, or fast-food restaurant employees.

Responding to these schemes, the DOJ has prosecuted a number of individual sureties for mail fraud, wire fraud, false statements, and false claims. In one case, the United States District Court for the District of Maryland recently sentenced an individual surety to five years' confinement. The Army PFD monitors these cases closely. In the last nine months, the Army suspension and debarment official has suspended, proposed for debarment, or debarred sixty individual sureties.

<sup>14</sup>40 U.S.C.A. §§ 270a-270f (West 1986).

<sup>15</sup>FAR subpt. 28.2.

The Army Bonds Examination Team, Contract Appeals Division, United States Army Legal Services Agency, reviews performance and payment bonds to ensure that they meet the requirements of the FAR. Ms. Lee Stroud, the chief of the team, can be reached at (703) 696-1522 or at DSN 226-1522. She and her assistants can provide PFAs with useful information about the acceptability of corporate or individual sureties.

Major Kevin Chapman, assigned to the Suspension and Debarment Branch, PFD, is responsible for surety fraud cases. He is available for questions and assistance at (703) 696-1543 or DSN 226-1543.

We wish to thank the contracting officers, investigating agents, and procurement fraud advisors for their diligence and hard work in this critical area. Keep up the great work!

### **Statutory and Regulatory Changes**

#### **New Developments in Overseas Debarments**

Since 31 December 1991, the authority of Army overseas debarring officials to suspend, to propose for debarment, or to debar a party has derived from the Secretary of the Army.<sup>16</sup> This authority formerly derived from the commander in chief of the theater of operations in which a debarring official operated.<sup>17</sup>

On 18 February 1992, The Judge Advocate General, acting pursuant to authority delegated by the Secretary of the Army, designated the following officials to perform the duties of debarring officials overseas: (1) Deputy Staff Judge Advocate, USAREUR and Seventh Army (Europe and Africa); (2) Staff Judge Advocate, United States Eighth Army (Korea); and (3) Staff Judge Advocate, United States Southern Command (Panama).

One significant effect of this change is that any party that an overseas debarring official suspends, proposes for debarment, or debars now is included on the GSA lists. Consequently, the administrative actions of debarment officials overseas now may affect the world-wide operations of the executive branch of the federal government.

Lieutenant Colonel Julius Rothlein, Chief, Remedies Branch, is available for questions and assistance in this area. He can be reached at (703) 696-1547 or DSN 226-1547.

### **Ten Examples of Remedial Measures and Mitigation Factors for Debarment**

Procurement fraud advisors and contracting officers should be aware of the various factors that debarring officials con-

sider in determining whether to debar a contractor. They should consider these factors when they make recommendations about debarments. Effective 25 February 1992, FAR 9.406-1(a) was amended to include a list of remedial measures and mitigating factors that debarring officials should consider in determining whether to debar a contractor. A similar list of factors previously appeared at Defense Federal Acquisition Regulation Supplement (DFARS) section 209.406-1(d)(1)-(8). The DFARS list proved so useful to DOD debarring officials that the other executive agencies decided to elevate it to the FAR as guidance for debarring officials throughout the federal government.

In pertinent part, FAR 9.406-1 provides,

Before arriving at any debarment decision, the debarring official should consider factors such as the following:

(1) Whether the contractor had effective standards of conduct and internal control systems in place at the time of the activity which constitutes cause for debarment or had adopted such procedures prior to any Government investigation of the activity cited as a cause for debarment.

(2) Whether the contractor brought the activity cited as a cause for debarment to the attention of the appropriate Government agency in a timely manner.

(3) Whether the contractor has fully investigated the circumstances surrounding the cause for debarment and, if so, [whether it has] made the result of the investigation available to the debarring official.

(4) Whether the contractor cooperated fully with Government agencies during the investigation and any court or administrative action.

(5) Whether the contractor has paid or has agreed to pay all criminal, civil, and administrative liability for the improper activity, including any investigative or administrative costs incurred by the Government, and [whether it] has made or [has] agreed to make full restitution.

(6) Whether the contractor has taken appropriate disciplinary action against the individuals responsible for the activity which constitutes cause for debarment.

<sup>16</sup>See Defense Fed. Acquisition Reg. Supp. 209.403(2) (31 Dec. 1991).

<sup>17</sup>See *id.* (1 Apr. 1984) (amended 1991).

(7) Whether the contractor has implemented or [has] agreed to implement remedial measures, including any [measures specifically] identified by the Government.

(8) Whether the contractor has instituted or [has] agreed to institute new or revised review and control procedures and ethics training programs.

(9) Whether the contractor has had adequate time to eliminate the circumstances within the contractor's organization that led to the cause for debarment.

(10) Whether the contractor's management recognizes and understands the seriousness of the misconduct giving rise to the cause for debarment and has implemented programs to prevent recurrence.<sup>18</sup>

The existence of a mitigating factor or a remedial measure set forth above is not determinative evidence of a contractor's present responsibility. Accordingly, if cause for debarment exists, the contractor bears the burdens of showing its present responsibility and of proving to the satisfaction of the debarring official that debarment is not necessary.

In assessing a contractor's present responsibility, and in deciding whether to debar a contractor, debarring officials also consult the following sources for guidance:

(a) DFARS 203.70 (Contractor Standards of Conduct).

(b) DFARS 203.50 (Other Improper Business Practices).

(c) The Defense Industry Initiations on Business Ethics and Conduct.

(d) The Guidelines for Sentencing Organizations.

Contractors Convicted of Felonies  
No Longer Must Be Considered  
for a Minimum One-Year Debarment

Section 8110 of the DOD Appropriations Act, 1992,<sup>19</sup> provided that no funds appropriated by the Act may be used to

comply with, or to implement, the provisions of "the Taft memorandum"—a 1984 memorandum from William H. Taft IV, then Deputy Secretary of Defense, that concerned the debarment of contractors convicted of felonies.<sup>20</sup> To ensure that the DOD complies with section 8110, Deputy Secretary of Defense Donald J. Atwood rescinded the Taft memorandum and DFARS subsection 209.406-4.<sup>21</sup> The second paragraph of the Atwood memorandum contained additional guidance for suspension and debarment officials.<sup>22</sup> It also directed that DFARS 209.406-1 be revised to reflect Mr. Atwood's concern that the DOD "assure itself that it contracts only with companies which meet ethical standards."<sup>23</sup>

Acting on this guidance, the FAR Debarment, Suspension and Business Ethics Committee revised DFARS 209.406-1 to reflect the intent of Congress and the directions of the Deputy Secretary of Defense. By deleting language from DFARS 209.406-1(a), the Committee extended the provisions of this section to situations in which a contractor has not been indicted or convicted of a felony, but the debarring official believes that an administrative agreement is needed to protect the interests of the DOD. The Committee also added new paragraph (b) to DFARS 209.406-1 to implement Mr. Atwood's guidance about contractors that have been indicted or convicted of felonies. This proposed amendment soon will be published in the *Federal Register* and will be subject to public comment over the next several months.

#### DOD Issues Procedures for Reducing or Suspending Contract Payments When Fraud Is Suspected

On 29 January 1992, the DOD issued an interim rule to clarify the implementation of section 836 of the National Defense Authorization Act for FY 1991.<sup>24</sup> Section 836 permits a federal agency to reduce, or to suspend, payments to a contractor when the agency head determines that the contractor's progress payment request is tainted by fraud.<sup>25</sup>

A contracting officer who believes that a contractor's request for a progress payment is fraudulent should discuss the situation with his or her PFA. If the contracting officer finds substantial evidence of fraud, he or she should forward a written report of the incident to the PFD, where the report will be evaluated, and appropriate action taken. Lieutenant Colonel Rothlein, Lieutenant Colonel France, Major Chapman, and Mrs. McCommas.

<sup>18</sup>FAR 9.406-1(a).

<sup>19</sup>Pub. L. No. 102-172, § 8110, 105 Stat. 1150, 1200.

<sup>20</sup>Memorandum, Deputy Secretary of Defense, 27 Aug. 1984, subject: Debarment from Defense Contracts For Felony Criminal Convictions.

<sup>21</sup>See Memorandum, Deputy Secretary of Defense, 16 Jan. 1992, subject: Suspension and Debarment.

<sup>22</sup>See *id.*

<sup>23</sup>*Id.*

<sup>24</sup>National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 836, 104 Stat. 1485, 1615.

<sup>25</sup>*Id.* § 836(a) (adding new subsection (f)(1) to 10 U.S.C. § 2307 (1988)).

## Professional Responsibility Notes

### OTJAG Standards of Conduct Office

#### Ethical Awareness

The following case summaries, which describe the application of the Army's Rules of Professional Conduct for Lawyers<sup>1</sup> to actual professional responsibility cases, may serve not only as precedents for future cases, but also as training vehicles for Army lawyers, regardless of their levels of experience, as they ponder difficult issues of professional discretion. To stress education and to protect privacy, neither the identities of the offices, nor the names of the subjects, will be published. Mr. Eveland.

#### Case Summaries

##### Army Rule 1.1

##### (Competence)

##### Army Rule 2.1

##### (Advisor)

*An attorney who met with his client for forty minutes, provided candid advice regarding relief from command, and counseled the client on matters beyond legal considerations, committed no ethical violations.*

An officer who had been relieved of his company command complained to the inspector general (IG) that his legal assistance attorney (LAA) had given him deficient legal advice. He claimed that the LAA had not helped him to contest the relief action, but had merely told him to study an employment agency's promotional brochure, *The Fast Track to Civilian Success*.

The complainant's account of his legal assistance appointment differed significantly from the LAA's recollection of the meeting. In a sworn statement, the complainant asserted, "When I went to CPT X's office, I had the letter of suspension with me. I did not consult with CPT X prior to receiving the letter." The LAA, however, reported that the complainant came for advice before receiving formal notice of his relief from command. The LAA's statement was corroborated by his calendar, which showed that the consultation took place three days before the date appearing on the complainant's written notice.

The officer also complained,

As I discussed my view of the facts, CPT X interrupted me. He glanced through the sus-

pension letter. CPT X informed me that he had heard about the case and had discussed it with the other lawyer in the office. He said the case would be hard to beat. . . . CPT X indicated that I needed to think about what was down the road concerning my future and that I should think about what my financial situation was. He said I should think about another career in civilian life. . . . He located in his office a brochure from the [employment agency]. He gave me a copy of this brochure.

The attorney's memory of this exchange was hazy, but he recalled that another client had given him a brochure similar to that described by the complainant. He acknowledged that he may have given this brochure to the complainant while discussing long-term goals.

A preliminary screening official (PSO) conducted an inquiry. The PSO found that the attorney had met with the complainant only once, had discussed the case with the complainant for forty minutes, and had offered to help the complainant to prepare a rebuttal when the complainant received formal notice of his impending relief. The PSO noted that, although the attorney had asked the complainant to call him as soon as he received something in writing, the disgruntled officer never returned to the legal assistance office after his initial appointment with the LAA and actually hired a civilian attorney to help him to contest the relief.

The LAA's supervisory judge advocate (JA) characterized the complaint as the result of a breakdown in attorney-client communication. He concluded that the LAA had not intended to avoid addressing the complainant's needs when he furnished the complainant with the brochure. He also noted that, like many legal assistance clients, the complainant misinterpreted advice and made inaccurate assumptions upon receiving news that the complainant did not want to hear. For example, because the LAA neglected to impress upon the complainant that, even though the LAA had prior knowledge of the case, he was not in league with the battalion commander, the complainant mistakenly inferred that the LAA was disloyal to him. Similarly, the LAA's incomplete explanation for postponing the preparation of a rebuttal until the complainant could show him the relief letter angered the complainant, who equated delay with lack of zeal.

The supervisory JA found that the LAA and complainant both contributed to the poor attorney-client relationship. He observed, however, that the LAA actually did provide the

<sup>1</sup>Dep't of Army, Pam. 27-26, Rules of Professional Conduct for Lawyers (31 Dec. 1987) [hereinafter DA Pam. 27-26].

complainant with effective assistance. Because the LAA had not violated professional standards, the supervisory JA decided that verbal counseling was adequate to remedy the complaint. The Office of The Judge Advocate General (OTJAG) agreed. Mr. Eveland.

*Army Rule 1.1  
(Competence)*

*An assistant trial counsel who illegally confined an accused in a detention cell breached his ethical duty to provide competent representation to the government.*

Private First Class Z, a mobilized National Guard member, went absent without leave (AWOL) and missed his unit's deployment. Authorities eventually apprehended Z and returned him to his mobilization site. There, the garrison commander placed Z in pretrial confinement, where he remained until a military magistrate ordered him released two weeks later.

Private Z declined nonjudicial punishment and demanded a court-martial. The case was forwarded to the active component (AC) supporting installation for processing by the general court-martial convening authority. After charges were referred, Private Z went AWOL for eight more days, returning to the mobilization site six days before trial.

Initial travel arrangements called for Private Z and his defense witnesses to fly approximately 1500 miles to the AC installation for trial. Two military police investigators (MPs) and the assistant trial counsel (ATC)—a judge advocate assigned to the staff judge advocate's (SJA's) office at Z's mobilization site—were to accompany Z and the witnesses. The ATC, however, learned shortly before the flight that the trial on the merits would be postponed. Because of this trial delay, the ATC cancelled travel plans for the defense witnesses. Consequently, Private Z, the ATC, and the MPs departed for the AC installation without the witnesses. During the flight, the accused tried to find out what had happened to his witnesses, but the ATC refused to tell him.

Upon arrival, the accused told the ATC that he had not received advance travel funds. The ATC cancelled the accused's hotel reservations, then, with the help of the MPs traveling with him, he persuaded the provost marshal's operations officer to confine the accused in the installation detention cell. Private Z remained in confinement until the following day, when the SJA and the provost marshal released him.<sup>2</sup>

In a pretrial hearing, the military judge admonished the trial counsel (TC) in the ATC's presence for confining Private Z illegally. Private Z then flew back to the mobilization site. There, he complained to the inspector general (IG) that the ATC, after cancelling the travel plans for the defense witnesses, had made fun of him and had plotted his confinement to attend a major league baseball game. The IG sent the complaint to the Executive, OTJAG, who directed the supervisory JA to appoint a PSO.

The PSO's inquiry produced a season program showing that no baseball game had been scheduled for the evening in question. The PSO also determined that the ATC properly kept his distance from Z and properly declined to answer Z's questions.<sup>3</sup> The PSO, however, suggested that, although the ATC did not treat Z improperly by refusing to discuss the case with him, he should have ensured that Z understood why the defense witnesses were not flying to the hearing.

The PSO further noted that, even though the SJA at the AC supporting installation had believed that pretrial confinement was appropriate in light of Z's second AWOL offense,<sup>4</sup> the ATC and Z's mobilization site garrison commander had determined shortly after Z returned from his second unauthorized absence that they could secure Z's presence at trial without confining him. The PSO concluded that the ATC erred by confining Z at the AC installation. The PSO, however, also pointed out that several legitimate concerns had influenced the ATC's decision. Among these concerns were the accused's record of desertion, AWOL, and missing movement (including Z's second AWOL offense, which he committed despite his promise to a military magistrate not to go AWOL before trial);<sup>5</sup> the ATC's inability to discuss less severe forms of restraint with the TC or the SJA at the AC

<sup>2</sup>A perfunctory reading of Uniform Code of Military Justice article 6, 10 U.S.C. § 806 (1988) [hereinafter UCMJ], could lead the unwary to believe that any commissioned officer, including the ATC in this case, lawfully could have ordered the accused into pretrial confinement. Article 6(b) states, "An enlisted member may be ordered into arrest or confinement by any commissioned officer by an order, oral or written, delivered in person or through other persons subject to this chapter." A competent analysis, however, requires that article 6 be read not only in connection with case law, but also with provisions of the Manual for Courts-Martial and Army Regulation (AR) 27-10 governing the return of an accused to pretrial confinement after his or her release from a confinement previously imposed in connection with the same offense. See generally Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 305(1) [hereinafter R.C.M.]; Army Reg. 27-10, Legal Services—Military Justice, para. 9-5 (22 Dec. 1989) [hereinafter AR 27-10].

<sup>3</sup>See DA Pam. 27-26, rule 4.2, (prohibiting a lawyer representing the Army from communicating with an accused about the trial unless the lawyer has the consent of the accused's defense counsel or is authorized by law to do so).

<sup>4</sup>An accused's commission of a new offense is grounds for reimposing pretrial confinement. See AR 27-10, ch. 9. Paragraph 9-5 of AR 27-10, which generally limits a unit commander's pretrial confinement authority, states, "[T]he unit commander may not order the return of [a person released from confinement by a magistrate] to pretrial confinement except when an additional offense is committed or on receipt of newly discovered information." AR 27-10, para. 9-5b(4) (emphasis added).

<sup>5</sup>The official discussion of Rule for Courts-Martial (R.C.M.) 305(h)(2) notes that "[a] person should not be confined as a mere matter of convenience or expedience," and identifies "[t]he accused's record of appearance at or flight from other pretrial investigations, trials, and similar proceedings" as one factor that a commander should consider before ordering the accused into pretrial confinement.

installation;<sup>6</sup> the ATC's concern that the accused would make unfounded allegations against the MPIs if they were forced to watch Z at a hotel; and (4) the lack of advance travel funds to pay for the accused's lodging during the trial.

Finally, the PSO identified the pretrial confinement as an inadvertent violation of the Uniform Code of Military Justice<sup>7</sup> and a minor violation of professional standards. Noting that

the ATC already had received oral admonitions from the military judge and the ATC's SJA, the PSO recommended that no further action be taken.

The supervisory JA and OTJAG concurred in the findings. Noting that the incident amounted to a minor violation of Army Rule 1.1<sup>8</sup> they held that, in light of the ATC's inexperience,<sup>9</sup> the oral admonitions were adequate. Mr. Eveland.

<sup>6</sup>Rule for Courts-Martial 305(h)(2)(B)(iv), which governs a commander's review of confinement decisions, mandates an accused's release from pretrial confinement unless, after considering other relevant factors, the commander concludes that "[l]ess severe forms of restraint are inadequate" to ensure the accused's presence at a trial, pretrial hearing, or investigation.

<sup>7</sup>See generally UCMJ arts. 7-14. Article 9(d) provides, "No person may be ordered into arrest or confinement except for probable cause." Rule for Courts-Martial 305 further states, "No person whose release from pretrial confinement has been directed . . . may be confined again before completion of trial except upon the discovery, after the order of release, of evidence or of misconduct which, either alone or in conjunction with all other available evidence, justifies confinement." R.C.M. 305(I); see also AR 27-10, para. 9-5b(4). The first magistrate's release determination triggered the application of R.C.M. 305(I) to Private Z.

<sup>8</sup>DA Pam. 27-26, rule 1.1 ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.").

<sup>9</sup>The prosecution of Private Z was the ATC's first case as a trial counsel.

## Information Management Office Notes

### OTJAG Information Management Office

#### LAAWS Bulletin Board Service

The Legal Automated Army-Wide System (LAAWS) operates a bulletin board service (BBS) dedicated to serving the Army legal community and certain approved Department of Defense (DOD) agencies. The LAAWS BBS is the successor to the Office of The Judge Advocate General (OTJAG) BBS, formerly operated by the OTJAG Information Management Office. Access to the LAAWS BBS currently is restricted to the following individuals:

- Active duty Army judge advocates;
- Civilian attorneys employed by the Department of the Army;
- Army Reserve judge advocates presently serving on active duty, or employed full-time by the federal government;
- Active duty Army legal administrators, noncommissioned officers, and court-reporters;

- Civilian legal support staff employed by the Judge Advocate General's Corps;
- Military and civilian attorneys employed by certain supported DOD agencies—for example, the Defense Logistics Agency or the Civilian Health and Medical Program of the Uniformed Services;

- Individuals with approved, written exceptions to policy.

Requests for exceptions to the access policy should be submitted to:

Headquarters, Department of the Army  
ATTN: DAJA-IM (LAAWS Project  
Management Officer)

The Pentagon  
Washington, DC 20310-2200

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downloading TJAGSA publications from the LAAWS BBS appear monthly in the *Current Material of Interest* section of *The Army Lawyer*. For additional information about the LAAWS BBS, contact the system operator, Staff Sergeant Mark Crumbley, at DSN 227-8655, or at the address listed above for the LAAWS Project Management Officer. Staff Sergeant Crumbley.

### **Automation Status Report**

This note provides an update on the status of LAAWS, the Judge Advocate General's Corps (JAGC) automation project. The purpose of this and subsequent automation notes is to present information that may be of interest and assistance to Army legal personnel involved with automation. As stated in articles and policy letters written on this subject in past years, communication and a common purpose are essential to our overall success in automation and information management.

### **Objective**

The LAAWS objective is to use computer technology to enhance delivery of the best possible legal service to the Army and its members. Everyone must be involved if we are to reach that objective.

### **System Architecture**

The LAAWS architecture, which is based on a one-to-one, person-to-personal computer (PC) ratio, has withstood the test of time. Everyone in our "law firm" processes information and the PC is the primary tool for that purpose. The PC, using commercial off-the-shelf software, provides essential functional capability for word processing, automated legal research, database management, spreadsheets and telecommunications. From the PC base, we build our networks and create specialized workstations for graphics, desktop publication, imaging, scanning, and CD-ROM applications.

### **System Configuration**

To select the array of peripheral devices, such as laser printers, modems, scanners, and CD-ROM drives, that best will benefit a legal office, an automation manager must consider the office's size and mission. The combination of components must be fully functional so that personnel in the office can accomplish each mission-essential task in the most economical, efficient, and effective way possible. The LAAWS Project Management Office (PMO) currently is designing system configurations for small, medium, and large legal offices. These configuration models will describe the "basic loads" of hardware and software needed to automate individual offices.

### **Standards**

Adherence to a common standard throughout the JAGC has proven difficult in view of differing mission requirements, major command and installation standards, and personal preferences. Nevertheless, a common standard is essential if JAGC legal offices are to remain compatible for hardware, software, telecommunications, and training purposes. Although the continuing development of automation technology promises to provide solutions that are hardware- and software-independent, at present, these solutions remain undiscovered. Consequently, the JAGC must adhere to the LAAWS standard. When adhering to this standard would prevent, or seriously impair, mission accomplishment, a legal office may request an exception to the standard. This request must be justified and approved by the JAGC Information Management Officer (IMO).

### **Life-Cycle Replacement**

Most PCs currently in service are more than five years old. Applications that have grown over the years no longer run efficiently on existing equipment. Accordingly, legal offices must secure funding as soon as possible for the life-cycle replacement of LAAWS computer equipment during fiscal years 1993 and 1994. Because centralized funding is not available to replace existing LAAWS equipment, each office should present its requirements to its local Director of Information Management (DOIM). The support of commanders and information management personnel is absolutely essential to our near- and long-term successes.

### **New Technology**

The LAAWS PMO is testing several new concepts that will facilitate delivery of legal services. For example, the PMO currently is considering the integration of criminal law and contract law reference materials in CD-ROM format into the Army Law Library System. It also is developing and evaluating document-imaging and tracking systems and is expanding and enhancing the LAAWS BBS. We must continue to be innovative and visionary in our uses of technology if we are to realize the potential productivity advantages that are available through automation.

### **Self-Help**

Intelligent and industrious people continue to be our greatest assets. We have used their talents to become leaders in the productive use of automation. That spirit and commitment must continue—especially in the absence of help from sources outside the JAGC. Supervisory judge advocates in each branch activity or office must designate automation coordinators to keep automation in step with user requirements and to help lead the way to the future. Each office IMO must direct and focus the efforts of the office to transform today's needs into tomorrow's solutions.

## Goals and Objectives

The JAGC must strive to achieve the following short-term objectives:

- We must work together to replace current z-248 and earlier PC workstations and peripherals by 1 October 1994;
- The LAAWS PMO must develop software programs in all functional areas by 1 October 1994; and
- Legal offices must work with their DOIMs to obtain networking capability for e-mail, file transfer and device sharing. All offices should be networked locally and should be integrated with the Defense Data Network by 1 October 1994.

Automation users throughout the JAGC also must continue to share useful ideas and programs. The LAAWS PMO is a clearing house for locally developed programs with potential corps-wide applications.

## Conclusion

As we enter the first life-cycle replacement phase of our LAAWS automation project, we should keep in mind the corps-wide efforts that have brought us this far. Working with each other and with DOIM support staffs, we can build on past successes, but we must start **NOW!** Please contact me at DSN 227-8655 or Lieutenant Colonel Gil Brunson at DSN 655-2922 if you have any questions concerning the LAAWS automation standards or goals. Colonel Rothlisberger.

## Guard and Reserve Affairs Item

Judge Advocate Guard and Reserve Affairs Department,  
TJAGSA

### Active Guard Reserve Judge Advocate Vacancies

A number of Active Guard Reserve (AGR) vacancies for senior captains and junior majors currently exist at major United States Army Reserve commands and Army Reserve general officer commands. The AGR program offers a unique opportunity to serve as a reservist-attorney. Candidates should have diverse legal backgrounds. Knowledge of the structure and operation of the Army Reserve is desirable. Reserve Component judge advocates seeking to be selected

for an initial three-year tour must submit their applications by 1 September 1992 to be considered by the board that will convene in January 1993. Applications for the program may be obtained from the Full Time Support Management Center, ATTN: DARP-ART (Mrs. Vaughn), 9700 Page Blvd., St. Louis, MO 63132-5200, (314) 263-9575. For further information contact Lieutenant Colonel Bate Hamilton, Judge Advocate Guard and Reserve Affairs Department, TJAGSA, (804) 972-6388.

## CLE News

### 1. Resident Course Quotas

Attendance at resident CLE courses at The Judge Advocate General's School (TJAGSA) is restricted to those who have been allocated student quotas. Quotas for TJAGSA CLE courses are managed by the Army Training Requirements and

Resources System (ATRRS), the Army-wide automated quota management system. The ATRRS school code for TJAGSA is 181. **If you do not have a confirmed quota in ATRRS, you do not have a quota for a TJAGSA CLE course.** Active duty service members must obtain quotas through their directorates of training, or through equivalent agencies.

Reservists must obtain quotas through their unit training offices or, if they are nonunit reservists, through ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132-5200. Army National Guard personnel request quotas through their unit training offices. To verify a quota, ask your training office to provide you with a screen print of the ATRRS R1 screen showing by-name reservations.

## 2. TJAGSA CLE Course Schedule

1992

- 6-10 July: 3d Legal Administrators' Course (7A-550A1).
- 8-10 July: 23d Methods of Instruction Course (5F-F70).
- 13-17 July: U.S. Army Claims Service Training Seminar.
- 13-17 July: 4th STARC JA Mobilization and Training Workshop.
- 15-17 July: Professional Recruiting Training Seminar.
- 20 July-25 September: 128th Basic Course (5-27-C20).
- 20-31 July: 128th Contract Attorneys' Course (5F-F10).
- 3 August-14 May 1993: 41st Graduate Course (5-27-C22).
- 3-7 August: 51st Law of War Workshop (5F-F42).
- 10-14 August: 16th Criminal Law New Developments Course (5F-F35).
- 17-21 August: 3d Senior Legal NCO Management Course (512-71D/E/40/50).
- 24-28 August: 113th Senior Officers' Legal Orientation (5F-F1).
- 31 August-4 September: 13th Operational Law Seminar (5F-F47).
- 14-18 September: 9th Contract Claims, Litigation, and Remedies Course (5F-F13).

## 3. Civilian Sponsored CLE Courses

September 1992

- 1-3: ESI, Just-in-Time and Systems Contracting, Denver, CO.
- 3-5: NITA, San Diego Expert Testimony, San Diego, CA.

9-10: ESI, Changes, Seattle, WA.

14-18: ESI, Federal Contracting Basics, Vienna, VA.

14-18: ESI, Accounting for Costs on Government Contracts, San Diego, CA.

14-18: GWU, Government Contract Law, Washington, DC.

15-18: ESI, Preparing and Analyzing Statements of Work and Specifications, Washington, DC.

21-25: GWU, Formation of Government Contracts, Washington, DC.

22-25: ESI, Contract Pricing, Washington, DC.

22-25: ESI, Negotiation Strategies and Techniques, Denver, CO.

22-25: ESI, ADP/Telecommunications (FIP) Contracting, San Diego, CA.

29-2 October: ESI, Subcontracting, Washington, DC.

29-2 October: ESI, Third Party Contracting for UMTA Grantees, Washington, DC.

29-2 October: ESI, Managing ADP/T (FIP) Projects, Washington, DC.

30: NWU, 5th Annual Symposium on Intellectual Property Law, Chicago, IL.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the February 1992 issue of *The Army Lawyer*.

## 4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	Reporting Month
**Alabama	31 December annually
Arizona	15 July annually
Arkansas	30 June annually
*California	1 February annually
Colorado	Anytime within three-year period
Delaware	31 July biennially
*Florida	Assigned month every three years
Georgia	31 January annually
Idaho	Every third anniversary of admission
Indiana	31 December annually
Iowa	1 March annually
Kansas	1 July annually
Kentucky	30 June annually
**Louisiana	31 January annually
Michigan	31 March annually

<u>Jurisdiction</u>	<u>Reporting Month</u>
Minnesota	30 August every third year
**Mississippi	1 August annually
Missouri	31 July annually
Montana	1 March annually
Nevada	1 March annually
New Mexico	30 days after program
**North Carolina	28 February annually
North Dakota	31 July annually
*Ohio	Every two years by 31 January
**Oklahoma	15 February annually
Oregon	Anniversary of date of birth— new admittees and reinstated mem- bers report after an initial one-year period; thereafter every three years
Pennsylvania	1 January annually
**South Carolina	15 January annually

<u>Jurisdiction</u>	<u>Reporting Month</u>
*Tennessee	1 March annually
Texas	Last day of birth month annually
Utah	31 December biennially
Vermont	15 July biennially
Virginia	30 June annually
Washington	31 January annually
West Virginia	30 June every other year
*Wisconsin	20 January every other year
Wyoming	30 January annually

For addresses and detailed information, see the January 1992 issue of *The Army Lawyer*.

\*Military exempt

\*\*Military must declare exemption

## Current Material of Interest

### 1. TJAGSA Materials Available Through Defense Technical Information Center

Each year, TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are unable to attend courses in their practice areas. The School receives many requests each year for these materials. Because the distribution of these materials is not within the School's mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is being made available through the Defense Technical Information Center (DTIC). An office may obtain this material in two ways. The first is to get it through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1-100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no charge. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314-6145, telephone (202) 274-7633, AUTOVON 284-7633.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service to facilitate ordering materials. Information con-

cerning this procedure will be provided when a request for user status is submitted.

Users are provided biweekly and cumulative indices. These indices are classified as a single confidential document and are mailed only to those DTIC users whose organizations have facility clearances. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer*. The following TJAGSA publications are available through DTIC. The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.

#### Contract Law

- AD A239203 Government Contract Law Deskbook, vol. 1/  
JA-505-1-91 (332 pgs).
- AD A239204 Government Contract Law Deskbook, vol. 2/  
JA-505-2-91 (276 pgs).
- AD B144679 Fiscal Law Course Deskbook/  
JA-506-90 (270 pgs).

#### Legal Assistance

- AD B092128 USAREUR Legal Assistance Handbook/  
JAGS-ADA-85-5 (315 pgs).

- \*AD A248421 Real Property Guide—Legal Assistance/  
JA-261-92 (308 pgs).
- AD B147096 Legal Assistance Guide: Office Directory/  
JA-267-90 (178 pgs).
- AD B147389 Legal Assistance Guide: Notarial/  
JA-268-90 (134 pgs).
- AD A228272 Legal Assistance: Preventive Law Series/  
JA-276-90 (200 pgs).
- \*AD A246325 Soldiers' and Sailors' Civil Relief Act/  
JA-260(92) (156 pgs).
- AD A244874 Legal Assistance Wills Guide/  
JA-262-91 (474 pgs).
- AD A244032 Family Law Guide/JA 263-91 (711 pgs).
- AD A241652 Office Administration Guide/  
JA 271-91 (222 pgs).
- AD B156056 Legal Assistance: Living Wills Guide/  
JA-273-91 (171 pgs).
- AD A241255 Model Tax Assistance Guide/  
JA 275-91 (66 pgs).
- \*AD A246280 Consumer Law Guide/JA 265-92 (518 pgs).
- AD A245381 Tax Information Series/JA 269/92 (264 pgs).

#### Administrative and Civil Law

- AD A199644 The Staff Judge Advocate Officer Manager's  
Handbook/ACIL-ST-290.
- AD A240047 Defensive Federal Litigation/  
JA-200(91) (838 pgs).
- AD A236663 Reports of Survey and Line of Duty  
Determinations/JA 231-91 (91 pgs).
- AD A239554 Government Information Practices/  
JA-235(91) (324 pgs).
- AD A237433 AR 15-6 Investigations: Programmed  
Instruction/JA-281-91R (50 pgs).

#### Labor Law

- AD A239202 Law of Federal Employment/  
JA-210-91 (484 pgs).
- AD A236851 The Law of Federal Labor-Management  
Relations/JA-211-91 (487 pgs).

#### Developments, Doctrine & Literature

- AD B124193 Military Citation/JAGS-DD-88-1 (37 pgs.)

#### Criminal Law

- AD B100212 Reserve Component Criminal Law PEs/  
JAGS-ADC-86-1 (88 pgs).
- AD B135506 Criminal Law Deskbook Crimes & Defenses/  
JAGS-ADC-89-1 (205 pgs).
- AD B137070 Criminal Law, Unauthorized Absences/  
JAGS-ADC-89-3 (87 pgs).
- AD B140529 Criminal Law, Nonjudicial Punishment/  
JAGS-ADC-89-4 (43 pgs).
- AD A236860 Senior Officers' Legal Orientation/  
JA 320-91 (254 pgs).
- AD B140543L Trial Counsel & Defense Counsel Handbook/  
JA 310-91 (448 pgs).
- AD A233621 United States Attorney Prosecutors/  
JA-338-91 (331 pgs).

#### Guard & Reserve Affairs

- AD B136361 Reserve Component JAGC Personnel Policies  
Handbook/JAGS-GRA-89-1 (188 pgs).

The following CID publication also is available through DTIC:

- AD A145966 USACIDC Pam. 195-8, Criminal  
Investigations, Violation of the U.S.C. in  
Economic Crime Investigations (250 pgs).

Those ordering publications are reminded that they are for government use only.

\*Indicates new publication or revised edition.

## 2. Regulations & Pamphlets

a. *Obtaining Manuals for Courts-Martial, DA Pams, Army Regulations, Field Manuals, and Training Circulars.*

(1) The U.S. Army Publications Distribution Center at Baltimore stocks and distributes DA publications and blank forms that have Army-wide use. Its address is:

Commander  
U.S. Army Publications Distribution Center  
2800 Eastern Blvd.  
Baltimore, MD 21220-2896

(2) Units must have publications accounts to use any part of the publications distribution system. The following extract from AR 25-30 is provided to assist Active, Reserve, and National Guard units.

The units below are authorized publications accounts with the USAPDC.

**(1) Active Army.**

(a) *Units organized under a PAC.* A PAC that supports battalion-size units will request a consolidated publications account for the entire battalion except when subordinate units in the battalion are geographically remote. To establish an account, the PAC will forward a DA Form 12-R (Request for Establishment of a Publications Account) and supporting DA 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. The PAC will manage all accounts established for the battalion it supports. (Instructions for the use of DA 12-series forms and a reproducible copy of the forms appear in DA Pam 25-33.)

(b) *Units not organized under a PAC.* Units that are detachment size and above may have a publications account. To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(c) *Staff sections of FOAs, MACOMs, installations, and combat divisions.* These staff sections may establish a single account for each major staff element. To establish an account, these units will follow the procedure in (b) above.

(2) *ARNG units that are company size to State adjutants general.* To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their State adjutants general to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(3) *USAR units that are company size and above and staff sections from division level and above.* To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation and CONUSA to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(4) *ROTC elements.* To establish an account, ROTC regions will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. Senior and junior ROTC units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation, regional headquarters, and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

Units not described in [the paragraphs] above also may be authorized accounts. To establish accounts, these units must send their requests through their DCSIM or DOIM, as appropriate, to Commander, USAPPC, ATTN: ASQZ-NV, Alexandria, VA 22331-0302.

Specific instructions for establishing initial distribution requirements appear in DA Pam 25-33.

If your unit does not have a copy of DA Pam 25-33, you may request one by calling the Baltimore USAPDC at (301) 671-4335.

(3) Units that have established initial distribution requirements will receive copies of new, revised, and changed publications as soon as they are printed.

(4) Units that require publications that are not on their initial distribution list can requisition publications using DA Form 4569. All DA Form 4569 requests will be sent to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. This office may be reached at (301) 671-4335.

(5) Civilians can obtain DA Pams through the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, Virginia 22161. They can be reached at (703) 487-4684.

(6) Navy, Air Force, and Marine JAGs can request up to ten copies of DA Pams by writing to U.S. Army Publications Distribution Center, ATTN: DAIM-APC-BD, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. Telephone (301) 671-4335.

b. Listed below are new publications and changes to existing publications.

Number	Title	Date
AR 15-41	Nuclear and Chemical Survivability Committee	20 Feb 92
AR 230-3	Department of the Army Welfare Fund	31 Mar 92

<b>Number</b>	<b>Title</b>	<b>Date</b>
AR 351-1	Individual Military Education and Training, Interim Change I01	27 Feb 92
AR 420-18	Facilities Engineering Materials, Equipment, and Relocatable Building Management	3 Jan 92
AR 600-29	Fund-Raising Within the Department of the Army	20 Mar 92
AR 600-106	Flying Status for Nonrated Army Aviation Personnel	2 Mar 92
AR 601-280	Total Army Retention Program, Interim Change 102	21 Feb 92
AR 672-20	Decorations, Awards, and Honors: Incentive Awards	3 Apr 92
AR 672-201	The Secretary of the Army Recruiter/Retention/Transition Noncommissioned Officer (NCO) of the Year Awards	14 Feb 92
AR 680-31	Personnel Information Systems, Interim Change I01	1 Apr 92
AR 700-90	Army Industrial Base Program	1 Apr 92
FM 25-50	Corps & Division Nuclear Training	Sep 91
Pam. 27-21	Administrative and Civil Law Handbook	15 Mar 92

### 3. Texas Attorney Occupation Tax.

Beginning 1 May, each attorney licensed to practice law in Texas will be notified by the Texas Comptroller of Public Accounts that he or she must pay a \$200 occupation tax. The Comptroller, however, has determined that attorneys employed by the federal government who do not engage in private practice are exempt from the tax. Accordingly, military attorneys should mark their bills "exempt due to employment as a military attorney" and should return them to the address provided by the Comptroller.

### 4. LAAWS Bulletin Board Service

a. Numerous publications produced by The Judge Advocate General's School (TJAGSA) are available through the

LAAWS Bulletin Board System (LAAWS BBS). Users can sign on the LAAWS BBS by dialing commercial (703) 693-4143, or DSN 223-4143, with the following telecommunications configuration: 2400 baud; parity-none; 8 bits; 1 stop bit; full duplex; Xon/Xoff supported; VT100 or ANSI terminal emulation. Once logged on, the system will greet the user with an opening menu. Members need only answer the prompts to call up and download desired publications. The system will ask new users to answer several questions. It then will instruct them that they can use the LAAWS BBS after they receive membership confirmation, which takes approximately twenty-four hours. *The Army Lawyer* will publish information on new publications and materials as they become available through the LAAWS BBS.

b. *Instructions for Downloading Files From the LAAWS Bulletin Board Service.*

(1) Log on the LAAWS BBS using ENABLE 2.15 and the communications parameters described above.

(2) If you never have downloaded files before, you will need the file decompression utility program that the LAAWS BBS uses to facilitate rapid transfer over the phone lines. This program is known as the PKUNZIP utility. To download it onto your hard drive, take the following actions after logging on:

(a) When the system asks, "Main Board Command?" Join a conference by entering [j].

(b) From the Conference Menu, select the Automation Conference by entering [12].

(c) Once you have joined the Automation Conference, enter [d] to Download a file.

(d) When prompted to select a file name, enter [pkz 110.exe]. This is the PKUNZIP utility file.

(e) If prompted to select a communications protocol, enter [x] for X-modem (ENABLE) protocol.

(f) The system will respond by giving you data such as download time and file size. You then should press the F10 key, which will give you a top-line menu. From this menu, select [f] for Files, followed by [r] for Receive, followed by [x] for X-modem protocol.

(g) The menu will then ask for a file name. Enter [c:\pkz110.exe].

(h) The LAAWS BBS and your computer will take over from here. Downloading the file takes about twenty minutes. Your computer will beep when the file transfer is complete. Your hard drive now will have the compressed version of the decompression program needed to explode files with the ".ZIP" extension.

(i) When the file transfer is complete, enter [a] to **Abandon** the conference. Then enter [g] for **Good-bye** to log-off the LAAWS BBS.

(j) To use the decompression program, you will have to decompress, or "explode," the program itself. To accomplish this, boot-up into DOS and enter [pkz110] at the C:\> prompt. The PKUNZIP utility then will execute, converting its files to usable format. When it has completed this process, your hard drive will have the usable, exploded version of the PKUNZIP utility program, as well as all of the compression and decompression utilities used by the LAAWS BBS.

(3) To download a file after logging on to the LAAWS BBS, take the following steps:

(a) When asked to select a "Main Board Command?" enter [d] to **Download** a file.

(b) Enter the name of the file you want to download from subparagraph c below.

(c) If prompted to select a communications protocol, enter [x] for **X-modem (ENABLE) protocol**.

(d) After the LAAWS BBS responds with the time and size data, type F10. From the top-line menu, select [f] for **Files**, followed by [r] for **Receive**, followed by [x] for **X-modem protocol**.

(e) When asked to enter a file name, enter [c:\xxxxx.yyy] where xxxxx.yyy is the name of the file you wish to download.

(f) The computers take over from here. When you hear a beep, file transfer is complete and the file you downloaded will have been saved on your hard drive.

(g) After the file transfer is complete, log-off of the LAAWS BBS by entering [g] to say **Good-bye**.

(4) To use a downloaded file, take the following steps:

(a) If the file was not compressed, you can use it on **ENABLE** without prior conversion. Select the file as you would any **ENABLE** word processing file. **ENABLE** will give you a bottom-line menu containing several other word processing languages. From this menu, select "**ASCII**." After the document appears, you can process it like any other **ENABLE** file.

(b) If the file was compressed (having the ".ZIP" extension) you will have to "explode" it before entering the **ENABLE** program. From the DOS operating system C:\> prompt, enter [pkunzip] [space] [xxxxx.zip] (where "xxxxx.zip" signifies the name of the file you downloaded from the LAAWS BBS). The PKUNZIP utility will explode the compressed file and make a new file with the same name, but with a new ".DOC" extension. Now enter **ENABLE** and call up the exploded file "XXXXX.DOC", by following instructions in paragraph (4)(a), above.

### c. TJAGSA Publications Available Through the LAAWS BBS.

The following is an updated list of TJAGSA publications available for downloading from the LAAWS BBS. (Note that the date a publication is "uploaded" is the month and year the file was made available on the BBS—the publication date is available within each publication.)

FILE NAME	UPLOADED	DESCRIPTION
121CAC.ZIP	June 1990	The April 1990 Contract Law Deskbook from the 121st Contract Attorneys' Course
1990_YIR.ZIP	January 1991	1990 Contract Law Year in Review in ASCII format. It originally was provided at the 1991 Government Contract Law Symposium at TJAGSA.
1991_YIR.ZIP	January 1992	TJAGSA Contract Law 1991 Year in Review
505-1.ZIP	February 1992	TJAGSA Contract Law Deskbook, vol. 1, May 1991
505-2.ZIP	February 1992	TJAGSA Contract Law Deskbook, vol. 2, May 1991
506.ZIP	November 1991	TJAGSA Fiscal Law Deskbook, November 1991
ALAW.ZIP	June 1990	The Army Lawyer and Military Law Review Database (ENABLE 2.15). Updated through 1989 The Army Lawyer Index. It includes a menu system and an explanatory memorandum, ARLAWMEM.WPF.
CCLR.ZIP	September 1990	Contract Claims, Litigation, & Remedies
FISCALBK.ZIP	November 1990	The November 1990 Fiscal Law Deskbook
JA200A.ZIP	March 1992	Defensive Federal Litigation, vol. 1
JA200B.ZIP	March 1992	Defensive Federal Litigation, vol. 2
JA210.ZIP	March 1992	Law of Federal Employment

FILE NAME	UPLOADED	DESCRIPTION
JA211.ZIP	March 1992	Law of Federal Labor-Management Relations
JA231.ZIP	March 1992	Reports of Survey and Line of Duty Determinations—Programmed Text
JA235.ZIP	March 1992	Government Information Practices
JA240PT1.ZIP	May 1990	Claims—Programmed Text, vol. 1
JA240PT2.ZIP	May 1990	Claims—Programmed Text, vol. 2
JA241.ZIP	March 1992	Federal Tort Claims Act
JA260.ZIP	May 1990	Soldiers' and Sailors' Civil Relief Act Pamphlet
JA261.ZIP	March 1992	Legal Assistance Real Property Guide
JA262.ZIP	March 1992	Legal Assistance Wills Guide
JA263A.ZIP	May 1990	Legal Assistance Family Law
JA265A.ZIP	May 1990	Legal Assistance Consumer Law Guide (1/3)
JA265B.ZIP	May 1990	Legal Assistance Consumer Law Guide (2/3)
JA265C.ZIP	May 1990	Legal Assistance Consumer Law Guide (3/3)
JA267.ZIP	March 1992	Legal Assistance Office Directory
JA268.ZIP	March 1992	Legal Assistance Notarial Guide
JA269.ZIP	March 1992	Federal Tax Information Series
JA271.ZIP	March 1992	Legal Assistance Office Administration Guide
JA272.ZIP	March 1992	Legal Assistance Deployment Guide
JA273.ZIP	March 1992	Legal Assistance Living Wills Guide
JA274.ZIP	March 1992	Uniformed Services Former Spouses' Protection Act—Outline and References

FILE NAME	UPLOADED	DESCRIPTION
JA275.ZIP	March 1992	Model Tax Assistance Program
JA276.ZIP	March 1992	Preventive Law Series
JA285.ZIP	March 1992	Senior Officers' Legal Orientation
JA290.ZIP	March 1992	SJA Office Manager's Handbook
JA296A.ZIP	May 1990	Administrative and Civil Law Handbook (1/6)
JA296B.ZIP	May 1990	Administrative and Civil Law Handbook (2/6)
JA296C.ZIP	May 1990	Administrative and Civil Law handbook (3/6)
JA296D.ZIP	May 1990	Administrative and Civil Law Handbook (4/6)
JA296F.ARC	April 1990	Administrative and Civil Law Handbook (6/6)
JA301.ZIP	October 1991	Unauthorized Absence—Programmed Instruction, TJAGSA Criminal Law Division
JA310.ZIP	October 1991	Trial Counsel and Defense Counsel Handbook, TJAGSA Criminal Law Division
JA320.ZIP	October 1991	Senior Officers' Legal Orientation Criminal Law Text
JA330.ZIP	October 1991	Nonjudicial Punishment—Programmed Instruction, TJAGSA Criminal Law Division
JA337.ZIP	October 1991	Crimes and Defenses Handbook (DOWNLOAD ON HARD DRIVE ONLY.)
YIR89.ZIP	January 1990	Contract Law Year in Review—1989

Reserve and National Guard organizations without organic computer telecommunications capabilities, and individual mobilization augmentees (IMAs) having bona fide military needs for these publications, may request computer diskettes containing the publications listed above from the appropriate proponent academic division (Administrative and Civil Law; Criminal Law; Contract Law; International Law; or Doctrine, Developments, and Literature) at The Judge Advocate General's School, Charlottesville, Virginia 22903-1781. Requests must be accompanied by one 5 1/4-inch or 3 1/2-inch

blank, formatted diskette for each file. In addition, a request from an IMA must contain a statement that verifies that the IMA needs the requested publications for purposes related to the military practice of law. Questions or suggestions concerning the availability of TJAGSA publications on the LAAWS BBS should be sent to The Judge Advocate General's School, Literature and Publications Office, ATTN: JAGS-DDL, Charlottesville, VA 22903-1781.

## 5. TJAGSA Information Management Item.

a. Each member of the staff and faculty at The Judge Advocate General's School (TJAGSA) has access to the Defense Data Network (DDN) for electronic mail (e-mail). To pass information to someone at TJAGSA, a DDN user should send an e-mail message to:

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b. Personnel desiring to reach someone at TJAGSA via autovon should dial 274-7115 to get the TJAGSA receptionist; then ask for the extension of the office you wish to reach.

c. Personnel having access to FTS 2000 can reach TJAGSA by dialing 924-6300 for the receptionist or 924-6 plus the three-digit extension you want to reach.

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